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SUPREME COURT, U.S.

81-6606

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

MARVIN FRANCOIS,

Petitioner,

vs.

THE STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

RORY S. STEIN
Assistant Public Defender

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE SUPREME COURT OF FLORIDA'S ARBITRARY REFUSAL TO REVIEW THE PETITIONER'S MERITORIOUS EQUAL PROTECTION CLAIM BASED ON UNDERREPRESENTATION OF HIS RACE ON DADE COUNTY'S GRAND JURIES IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND PRESENTS CONSTITUTIONAL QUESTIONS OF VITAL AND CONTINUING IMPORTANCE TO THE CRIMINAL JUSTICE SYSTEM?

II

WHETHER THE SUPREME COURT OF FLORIDA'S ARBITRARY IMPOSITION OF THE DEATH PENALTY IN THIS CASE WITHOUT REMAND FOR RESENTENCING BY THE TRIAL COURT DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND CONCERNS A CONSTITUTIONAL QUESTION OF VITAL IMPORTANCE PRESENTLY BEING CONSIDERED BY THIS COURT IN STEPHENS V. ZANT, 631 F.2d 397 (5th Cir. 1980) CERT. GRANTED _____U.S._____,102 S.Ct. 90 (1981)?

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THE STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, MARVIN FRANCOIS, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida rendered on January 28, 1982.

OPINION BELOW

The full opinion of the Supreme Court of Florida is attached as part of Petitioner's Appendix. (App. 1-8). The reported opinion appears at 407 So.2d 885.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), to review the judgment and opinion of the Supreme Court of Florida. That judgment and opinion was entered on October 15, 1981. (App. 1-8). A timely petition for rehearing was denied on January 28, 1982. (App. 1). An order extending the time for the filing of this Petition up to and including April 28, 1982, was entered by the Honorable Justice Powell on March 22, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Florida law set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Francois was convicted on six counts of first-degree murder, two counts of attempted first-degree murder and three counts of robbery in the Circuit Court of the Eleventh Judicial Circuit of Florida. (App. 3). As a result of his conviction, the petitioner was sentenced to death. (App. 3).

Prior to his trial, the Petitioner filed a motion to dismiss the indictment[1] which charged him with the aforementioned offenses. (App. 9-17). In his motion, the Petitioner alleged that he had been denied equal protection and due process of law because the grand jury that had indicted him was illegally constituted. (App. 10, 11). Specifically, the Petitioner alleged that there had been a substantial disparity between the percentage of blacks[2] and Hispanics in Dade County's eligible population and the percentage of these groups on venires selected for grand jury service, for the five year period preceding the return of the challenged indictment. (App. 10, 11). In support of his motion, the petitioner attached exhibits and affidavits which included statistical data reflecting the racial composition (percentage of blacks and latins) of Dade County's general population, registered voters, grand jury master list[3] and actual grand juries. (App. 18-96). Petitioner's statistical proffer demonstrated an average actual disparity of 9.38% among blacks

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1 The Constitution of the State of Florida requires that offenses which are punishable by death shall be prosecuted by indictment. Florida Constitution, Article I, Section 15.

2 Petitioner Francois is black.

3 The grand jury master lists were not made available to the petitioner although they were requested from the Clerk of the Circuit Court prior to trial. (App. 20). Additionally, the petitioner moved for disclosure of the master lists as part of his motion to dismiss. (App. 9-11). As a result of the trial court's denial of his motion to dismiss, the master lists were never provided to Petitioner. The master list percentage in petitioner's exhibits were estimated after taking into account the actual grand jury percentages and Florida's statutory requirement that the actual grand jury be randomly selected from the grand jury master list. Chapter 57-550 and Chapter 70-1000, Laws of Florida.

and 20.6% among Latins, when comparison is made of the average eligible population and master list[4] percentage for each group. (App. 19). Utilizing the Comparative Disparity Standard[5], these figures establish that blacks and latins were underrepresented on the grand juries of Dade County by 68.47% and 70.81%, respectively.

On April 17, 1981, the trial court denied the Petitioner's motion to dismiss without an evidentiary hearing, finding that the grand jury was legally constituted. (App. 136). At the conclusion of the petitioner's trial and after an advisory sentence of death was received from the jury, the trial court, finding that there were seven aggravating circumstances[6] and no mitigating circumstances sustained by the evidence, imposed the sentence of death. (App. 3, 6).

On direct appeal, the Supreme Court of Florida refused to review the grand jury challenge raised by the petitioner in the lower court. Although finding that the petitioner's motion had been timely filed, the Supreme Court of Florida held that petitioner had waived his right to appeal the trial court's denial of his motion because defense counsel, as a defense tactic to upset the petitioner's convictions on appeal, waited until the day of trial to argue his motion to dismiss. (App. 5).

On review of petitioner's sentence, the Supreme Court of Florida held that the trial court had erred in finding three of the seven aggravating circumstances upon which the petitioner's death sentence was based. (App. 6, 7). Relying on the lack of mitigating circumstances, the Supreme Court of Florida nevertheless upheld the petitioner's death sentence. (App. 7).

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4 Since the percentage of blacks actually serving on grand juries was slightly higher than the percentage estimated for the master list, 4.32% as against 4.0%, the larger figure will be used in this Petition for analysis purposes. The estimated percentage of Latins on the master list, 3.0% was slightly greater then the percentage of Latins actually serving, 2.15%. Again, the greater figure will be used in this Petition for the purposes of analysis.

5 See D. Kairys, Jury Representativeness: A Mandate for Multiple Source Lists, Cal.Law Rev. Vol. 65, 776, 790.

6 Section 921.141(5), Florida Statutes.

Due to the clear conflict among the decisional law of this Court, the United States Courts of Appeals and the Supreme Court of Florida's decision in the instant case, and due to the important questions of federal constitutional law herein raised, this petition for writ of certiorari is hereby presented pursuant to Rule 17 of this Court.

ARGUMENT

I

REASON FOR GRANTING THE WRIT

THE SUPREME COURT OF FLORIDA'S ARBITRARY REFUSAL TO REVIEW THE PETITIONER'S MERITORIOUS EQUAL PROTECTION CLAIM BASED ON UNDERREPRESENTATION OF HIS RACE ON DADE COUNTY'S GRAND JURIES IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND PRESENTS CONSTITUTIONAL QUESTIONS OF VITAL AND CONTINUING IMPORTANCE TO THE CRIMINAL JUSTICE SYSTEM.

Since 1880, the Equal Protection Clause of the Fourteenth Amendment has precluded conviction of an accused upon an indictment which was returned by a grand jury from which members of the accused's race were excluded solely because of their race. Strauder v. West Virginia, 100 U.S. 303, 310 (1880). Subsequent decisions of this Court have held that substantial underrepresentation of any recognizable class violates equal protection where there had been an intent to discriminate. Casteneda v. Partida, 430 U.S. 482, 493 (1917); Swain v. Alabama, 380 U.S. 202 (1965). Intent to discriminate is presumptively proved by statistical evidence which demonstrates that over a period of time the degree of underrepresentation has been substantial. Casteneda v. Partida, 430 U.S. at 494; Washington v. Davis, 426 U.S. 229, 241 (1976); Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972). Furthermore, proof that the procedure which selected the grand jurors is "susceptible of abuse or is not racially neutral supports the presumption of [intentional] discrimination raised by the statistical showing." Casteneda v. Partida, 430 U.S. at 494 (citations omitted).

Standing to assert an equal protection claim of underrepresentation is achieved when the accused demonstrates

that he is a member of "recognizable, distinct class, singled out for different treatment under laws, as written or applied." Casteneda v. Partida, 430 U.S. at 494. Blacks, latins and women have been judicially recognized as distinct classes to which relief may be granted. Strauder v. West Virginia, 100 U.S. at 309 (blacks); Hernandez v. Texas, 347 U.S. 475, 480 (1954) (latins); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (women).

The burden of proving substantial underrepresentation rests with the accused. Casteneda v. Partida, 430 U.S. at 494. However, "[o]nce the defendant has shown substantial underrepresentation of his group, he had made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." Casteneda v. Partida, 430 U.S. at 495; Alexander v. Louisiana, 405 U.S. at 631-32.

Applying these principles to this case, the record demonstrates that the indictment should have been dismissed or, in the alternative, an evidentiary hearing should have been held because of the substantial underrepresentation of blacks on the venire from which the grand jury had been selected and because the system which produced this result had, over a significant period of time, repeated this pattern of underrepresentation. See, Coleman v. Alabama, 377 U.S. 129 (1964).

The grand jury which indicted the Petitioner was randomly selected from a pool of five hundred individuals personally chosen by Dade County's circuit judges. (App. 15, 16, 139-146). Chapter 57-550 and Chapter 70-1000, Laws of Florida.[7] If blacks were properly represented among the individuals selected by the circuit judges for grand jury service, the random selection process required by Florida law would assure that blacks would be properly represented on Dade County's grand juries. Casteneda v. Partida, 430 U.S. at 496, footnote 17. An examination of the statistics proffered reveals that blacks were severely underrepresented on Dade County's grand juries for a period of

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[7] This procedure for selection of grand jurors was abandoned in May, 1978, in favor of a computer selection method. Chapter 78-455, Laws of Florida.

five years. (App. 19). The only explanation for the large disparity between the average percentage of blacks serving on grand juries and the percentage of blacks in the general population is that the judges had failed to choose sufficient numbers of blacks for the pool of potential grand jurors. (App. 21).

In Casteneda v. Partida, supra, this Court exhaustively analyzed the equal protection problems arising from state laws which direct officials to personally, rather than randomly select individuals for grand jury service. The evidence in Casteneda showed that in a county which was 79.1% Mexican-American, only 39% of the individuals summoned for grand jury service were of such descent. Applying statistical analysis, this Court concluded that this result could not have been achieved by random causes. Where a selection process results in underrepresentation which cannot be explained by random causes, this Court held that presumptive proof of substantial underrepresentation and a discriminatory purpose had been established. Casteneda v. Partida, 430 U.S. at 495-96.

The Petitioner, a black male, clearly has standing to challenge black underrepresentation. Alexander v. Louisiana, supra. Petitioner's statistical data demonstrated an absolute differential of 10.88% (15.2-4.32) between the average percentage of blacks in the general population[8] and the average percentage of blacks randomly selected for grand jury service. (App. 19). Application of the Comparative Disparity Standard reveals that blacks were underrepresented on Dade County's grand juries by 70.72%[9]. (App. 19). This figure of 70.72% underrepresentation indicates that a black has a 70.72% less chance of being included on a grand jury than a non-black. The probability of by chance selecting only eight blacks for grand jury service over a four-

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[8] Application of average eligible population percentages rather then general population percentages as advocated by Cheif Justice Burger in his dissent in Casteneda, yields the following disparity, 9.38%,and consequent underrepresentation of 68.47%.

[9] This figure is derived from the following equation: 15.2-4.32 x 100÷15.2 = 70.72%.

year period was determined to be less then one in one thousand. (App. 21).

The petitioner's statistical proffer was sufficient to establish a prima facie case of discrimination in the process by which Dade County's grand juries were selected. Casteneda v. Partida, 430 U.S. at 494-5; Alexander v. Louisiana, 405 U.S. at 631-2. The trial court, however, without the benefit of an evidentiary hearing as requested by petitioner, denied the petitioner's motion to dismiss the indictment finding that the grand jury had been lawfully constituted. (App. 136). The trial court's ruling was plainly error.[10] Casteneda v. Partida, supra; Alexander v. Louisiana, supra; Turner v. Fouche, 396 U.S. 346 (1970); Jones v. Georgia, 389 U.S. 24 (1967).

The Supreme Court of Florida's refusal to consider the petitioner's grand jury challenge on direct appeal supports the necessity for the issuance of the Writ in this cause. The Supreme Court of Florida, relying on this Court's decisions in Francis v. Henderson, 425 U.S. 536 (1976) and Davis v. United States, 411 U.S. 233 (1973), held that the petitioner had waived his right to appeal because the Court perceived that defense counsel had engaged in improper tactics by requesting a hearing on his motion to dismiss on the day of trial. (App. 5). The Supreme Court of Florida opined that defense counsel's delaying tactics were directed at upsetting his conviction on appeal.

The Supreme Court of Florida's conclusion that the petitioner had waived his right to appeal the denial of his grand jury challenge was not based on any concept of waiver known to Florida's statutes or rules of procedure. In fact, the Supreme Court of Florida specificallly found that petitioner's challenge was timely made and was otherwise in accordance with Florida Rule

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10 Due to the nature of the trial court's ruling, the respondent placed no evidence in the record rebutting, as they must, the petitioner's prima facie showing. Alexander v. Louisiana, 405 U.S. at 632; Turner v. Fouche, 396 U.S. 346, 361 (1970). In Florida courts, factual matters alleged in motions to dismiss are deemed when not specifically denied by the state. Fla.R.Crim.P. 3.190(d).

of Criminal Procedure 3.190,[11] the rule governing motions to dismiss in the State of Florida. The trial court, perceiving no waiver by petitioner's counsel, ruled on the merits of petitioner's challenge, albeit without an evidentiary hearing. (App. 136). The Supreme Court of Florida, reading between the lines of the transcripts of the pre-trial hearings, perceived improper motives that the trial court had not.[12] (App. 5). The Supreme Court of Florida's reliance on Francis v. Henderson, supra, and United States v. Davis, supra, for its refusal to review petitioner's claim is misplaced.

In Francis v. Henderson, supra, a state prisoner sought federal habeas corpus relief grounded upon a claim that blacks had been excluded from the grand jury that had indicted him. The prisoner, Francis, had not raised his grand jury challenge at the time of trial, as was required by Louisiana law. Francis did not appeal his conviction. Instead, Francis sought federal habeas corpus relief six year after his trial. This Court held that Francis should be denied federal habeas corpus relief and that effect be given to the waiver provisions of Louisiana law unless Francis could demonstrate cause for his waiver and actual prejudice resulting from the claimed error.

This Court has reaffirmed the principles of Francis v. Henderson, supra in Wainwright v. Sykes, 433 U.S. 72 (1977) and more recently in Engle v. Isaac, ____U.S.____(Case No. 80-1430, Op. filed 4/5/82). These cases now clearly stand for the

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11 Florida Rules of Criminal Procedure 3.190 requires that motions to dismiss be filed at or before arraignment unless the court grants a defendant additional time. The Supreme Court of Florida correctly determined that the petitioner timely filed his petition within the time as extended by the Court, thereby avoiding the waiver provision of subsection (c) of the rule. The rule otherwise anticipates only that the motion be heard prior to trial.

12 Chief Justice Sundberg in his dissenting opinion to the majority opinion of the Supreme Court of Florida found no improper motives in the actions of petitioner's counsel. Justice Sundberg instead found that counsel originally attempted to defer consideration of his grand jury claim in order to prepare for that as well as the other numerous issues in petitioner's complex trial. (App. 7, 8). Justice Sundberg concluded that petitioner's statistical proffer had established a prima facie case of an illegally composed grand jury and was entitled to an evidentiary hearing. (App. 8).

proposition that a state prisoner may not obtain federal habeas relief, absent a showing of cause and actual prejudice, when a procedural default barring state litigation of a constitutional claim has occurred. Engle v. State, supra.

It is likewise clear that Francis v. Henderson, supra, and its progeny do not support a state court's refusal to review a constitutional claim where there has been no state precedural default by a state prisoner. In this case, the petitioner complied with Florida's procedural requirements with regard to his grand jury challenge. (App. 4, 5, 147-149). The trial court below had an opportunity to and did rule on the merits of the petitioner's claim. (App. 136). These factors distinguished this case from the factual patterns present in Francis v. Henderson, supra, Wainwright v. Sykes, supra and Engle v. Isaac, supra. The actions of petitioner's trial counsel, which were consistent with the requirements of Florida law, served as no impediment to review by the Florida Supreme Court and clearly do not serve as a bar to review by this Court. The Supreme Court of Florida's perception of improper motives, a perception which is unsupported by the record and plainly inconsistent with petitioner's compliance with Florida procedural rules, is not an "independent and adequate state procedural ground" which could prevent review by this Court. Wainwright v. Sykes, 433 U.S. at 86, 87. Williams v. Georgia, 349 U.S. 375 (1955)(discretionary decision by State Supreme Court to refuse to hear petitioner's constitutional claim reviewable by this Court); Davis v. Wechsler, 263 U.S. 143 (1923).

The Supreme Court of Florida's arbitrary refusal to review petitioner's grand jury attack sharply conflicts with the due process requirements that a full and fair resolution of the merits be afforded to persons convicted of crimes on their "one and only appeal". Douglas v. California, 372 U.S. 353, 357 (1963). It has long been established that the requirements of due process of law fully apply to the appellate process:

> . . . .[T]he proceedings in the appellate tribunal are to be regarded as part of the process of law under which [a convicted person] is held in custody, and

> to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment. Frank v. Magnum, 237 U.S. 309, 327 (1915).

While this Court has never held that the States are required to establish appellate review procedures . . . .

> . . . It is now fundamental that, once established, these avenues must be kept free of unreasonable distinctions that can only impede open and equal access to the Court. Rinaldi v. Yeager, 384 U.S. 305 (1966)(citations omitted).

The Supreme Court of Florida's arbitrary refusal to review the petitioner's constitutional claim, coupled with the trial court's refusal to afford petitioner an evidentiary hearing on his motion to dismiss, violates the underpinnings[13] of the Engle v. Isaac, supra and Wainwright v. Sykes, supra, decisions as well as fundamental due process concepts of fairness. Intervention by this Court is required to correct the Supreme Court of Florida's erroneous and expansive interpretation of this Court's decision in Francis v. Henderson, supra, and to provide the petitioner with an opportunity to be fully and fairly heard on his meritorious equal protection claim derived from the illegally composed grand jury that indicted petitioner.

II

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT OF FLORIDA'S ARBITRARY IMPOSITION OF THE DEATH PENALTY IN THIS CASE WITHOUT REMAND FOR RESENTENCING BY THE TRIAL COURT DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND CONCERNS A CONSTITUTIONAL QUESTION OF VITAL IMPORTANCE PRESENTLY BEING CONSIDERED BY THIS COURT IN STEPHENS V. ZANT, 631 F.2d 397 (5th Cir. 1980) CERT. GRANTED ____U.S.____, 102 S.Ct. 90 (1981).

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court upheld the constitutionality of Florida's death-sentencing procedures, relying on the Supreme Court of Florida's reviewing role as a safeguard against arbitrary and capricious imposition

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13 The Engle decision contemplates good faith attempts by the states to honor an individuals constitutional rights. Engle v. Isaac, supra.

of the death penalty. In assessing its role as the tribunal for review of Florida's death-sentencing scheme, the Supreme Court of Florida noted, "it is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideraton and which are not, and then impose the proper sentence. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). Yet, despite its protestations to the contrary, the Supreme Court of Flroida in this case culled through the list of aggravating circumstances found by the trial judge, determined which were applicable to the petitioner, speculated as to the weight probably given them by the trial court and imposed the death sentence. (App. 7). In doing so, the Supreme Court of Florida violated the petitioner's Eight and Fourteenth Amendment rights to be free from cruel and unusual punishment.

Pursuant to Section 921.141(3), Florida Statutes (1977), the trial court entered written findings in support of its sentence of death. (App. 6, 137, 138). In its order, the trial court found the following aggravating circumstances: 1) the petitioner had previously been convicted of a violent felony, Section 921.141(5)(b), Florida Statutes (1977); 2) in committing the crimes, the petitioner knowingly created a great risk of death to many persons, Id. Section 921.141(5)(c); 3) the crimes were committed for the purposes of avoiding or preventing lawful arrest, Id. Section 921.141(5)(e); 4) the crimes were committed during the course of a robbery, Id. Section 921.141(5)(d); 5) the crimes were committed for pecuniary gain, Id. Section 921.141(5)(f); 6) the crimes were committed to disrupt law enforcement, Id. Section 921.141(5)(g); and that the crimes were especially henious, atrocious and cruel, Id. Section 921.141(5)(h). The trial judge found no mitigating circumstances. (App. 6).

On appeal, the Supreme Court of Florida found the evidence to be legally insufficient to sustain the trial court's finding that the petitioner knowingly created a great risk of death to many persons. (App. 7). The court struck that aggravating

circumstance. (App. 7).

The Supreme Court of Florida also found error in the trial court's separate consideration of aggravating circumstances that were based on the same aspect of the crime. (App. 7). Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied 431 U.S. 969 (1977). As such, the Supreme Court of Florida held that it was improper for the trial court to find that the murders were committed in the course of robberies and that they were committed for pecuniary gain. (App. 7). The same theory was held applicable to the trial court's improper reliance on its findings that the murders were committed to avoid or prevent a lawful arrest and that they were committed to disrupt or hinder the enforcement of the laws. (App. 7).

After reducng the number of properly found aggravating circumstances to four, the Supreme Court of Florida nevertheless upheld the petitioner's death sentence finding that consideration of the erroneous aggravating circumstances had not interfered with the weighing process since no mitigating circumstances had been found by the trial court. (App. 7). The Supreme Court of Florida's concluson necessarily involves a misinterpretation of Section 921.141 and the weighing process described therein; a process inherent in the "channeled discretion" possessed by trial judges and juries deemed essential to the constitutionality of Florida's death-sentencing scheme. Godfrey v. Georgia, U.S. ___, 100 S.Ct. 1759, 1764 (1980); Gregg v. Georgia, 428 U.S. 153, 199 (1976); Proffitt v. Florida, supra.

Section 921.141(2), Florida Statutes (1977), requires that a jury render an advisory sentence based upon a weighing and comparison of sufficient aggravating and mitigating circumstances. Notwithstanding the jury's recommendation, the trial court, pursuant to Section 921.141(3), Florida Statutes (1977), must weigh the aggravating and mitigating circumstances and determine the appropriate sentence. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

Two observations about the statutory weighing process are critical to the petitioner's constitutional claim and the

constitutionality of the process itself. First, the weighing process anticipates that reasoned judgment will be employed as to the weight to be given to an individual circumstance under a particular factual situation, rather than a mere counting process of 'X number of aggravating circumstances and Y number of mitigating circumstances. Dixon v. State, 283 So.2d 1, 10 (Fla. 1973). Second, the weighing process includes not just a comparison of aggravating and mitigating circumstances but a weighing of the aggravating circumstances themselves, in the absence of mitigating circumstances, to determine whether the death penalty is required for a particular individual. Alvord v. State, 322 So.2d 533 (Fla. 1975).

In Alvord v. State, supra, the Supreme Court of Florida recognized that a death sentence is not required, even where there are aggravating circumstances, and mitigating circumstances are absent:

> . . . The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.
>
> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Alvord v. State, 322 So.2d at 540.

In its opinion below, the Supreme Court of Florida usurped the role of the trial court by unilaterally reweighing the remaining aggravating circumstances and arriving at death as an

appropriate sentence. (App. 7). As such, the Supreme Court of Florida went beyond its function as a reviewing court; in this case, the state court of last resort was the sentencing court. The lack of mitigating circumstances in this case does not resolve the question regarding the propriety of death as penalty. Still to be answered by the trial court was whether the remaining, properly determined aggravating circumstances were sufficient to justify imposition of the death penalty under the factual circumstances of this case. Alvord v. State, 322 So.2d at 540. Instead, the Supreme Court of Florida erroneously took it upon itself to resolve that question by apparently assuming that the trial court would have placed sufficient weight on the remaining aggravating circumstances to justify the death penalty. (App. 7). The Supreme Court of Florida's arbitrary imposition of the death sentence in the instant case violates the petitioner's Eighth and Fourteenth Amendment rights.

In Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted ____ U.S. ____, 102 S.Ct. 90 (1981), one of the several aggravating circumstances considered and found in the trial court was thereafter declared unconstitutional by the Supreme Court of Georgia. Id. at 405. The state court, "[a]fter eliminating that circumstances from consideration . . . found the evidence supported the jury's findings of the other statutory aggravating circumstance and held that the sentence was not impaired." Ibid. (citation omitted).

The Fifth Circuit found Stephens death sentence to be violative of the Eighth Amendment. The court noted, "[i]t is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance." Ibid. As a result, the court concluded that the process in which the death penalty was imposed was not "rationally reviewable," as required by the Eighth Amendment. Ibid. (citations omitted).

Subsequently, in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), the Fifth Circuit reached the same conclusion when a non-statutory aggravating circumstance had entered into the weighing

process in a Florida trial court. In Henry, respondent Wainwright argued that the improper consideration of non-statutory aggravating factors was harmless in view of the total absence of mitigating factors. The Fifth Circuit rejected that argument and, in noting that Henry's death sentence had been upheld in violation of the Eighth Amendment, stated:

> . . . Guarding against the arbitrary and discriminatory impositon of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper non-statutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

Henry v. Wainwright, 661 F.2d at 59, 60.

As in Stephens v. Zant, supra and Henry v. Wainwright, supra, a number of improper or erroneous aggravating factors were considered in the weighing process conducted by the trial court in the case at bar. On appeal, the Supreme Court of Florida necessarily engaged in speculation in concluding that the excluded aggravating factors played no part in the trial court's determination that a death sentence was appropriate. The decisions in Stephens and Henry compel the conclusion that this type of speculative review is violative of the Eighth and Fourteenth Amendments. See, Godfrey v. Georgia, supra. Intervention by this Court is necessary to remedy the constitutional violation suffered by the petitioner and to resolve the conflict of decisions between the Fifth Circuit and the Supreme Court of Florida regarding this important constitutional question.

CONCLUSION

The significance of the questions presented in the instant petition is evident. The need for resolution of these questions as well as harmonization of the decisions of this Court, the federal courts of appeal and the Supreme Court of Florida is great. The Writ of Certiorari should issue.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3078

BY: Rory S. Stein
RORY S. STEIN
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6606

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SUPREME COURT, U.S.

MARVIN FRANCOIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

APPENDIX

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Marvin FRANCOIS, Appellant,

v.

STATE of Florida, Appellee.

No. 54461.

Supreme Court of Florida.

Oct. 15, 1981.

Rehearing Denied Jan. 28, 1982.

Defendant was convicted in the Circuit Court, Dade County, Richard S. Fuller, J., of six counts of first-degree murder, two counts of attempted first-degree murder, and three counts of robbery, and upon being sentenced to death, defendant appealed. The Supreme Court held that: (1) right to appeal denial of motions for discovery, for a hearing, and to dismiss indictment for reason of alleged systematic exclusion of persons of a particular race from grand jury was waived by defendant by failing to diligently pursue matter and by inducing trial court to rule against him when a favorable ruling would have resulted, possibly, in convening of a new grand jury and issuance of a new indictment or at least in a delay of trial for purposes of discovery or evidentiary hearing or both and (2) although trial court's sentencing errors resulted in recitation of three statutory aggravating circumstances that were not properly established by evidence, sentences of death were nevertheless warranted, where defendant, twice previously convicted of felonies which involved use or threat of violence, was convicted of six premeditated, execution style murders committed in course of committing robbery and for purpose of eliminating witnesses to crimes of robbery, murders were especially heinous, atrocious, and cruel, there were four statutory aggravating circumstances and there were no mitigating circumstances.

Affirmed.

Sundberg, C. J., dissented and filed opinion.

1. Homicide ⇐253(1), 256
Robbery ⇐24.1(1)

Evidence, including testimony of individuals who survived robberies and shootings which were fatal to six others, was sufficient to sustain convictions of six counts of first-degree murder, two counts of attempted first-degree murder, and three counts of robbery.

2. Criminal Law ⇐938(1)

A new trial based on assertion that testimony of alibi witness was newly discovered evidence and that State suppressed information concerning identity and whereabouts of witness was not warranted since, if anyone had known about witness and her possible value to defendant for alibi purposes, it would have been the defendant and, in any event, alleged alibi testimony would not have been probative because evidence showed that crimes were committed well before times with which alibi testimony was concerned.

3. Indictment and Information ⇐144

Rule providing that motion to dismiss must be made either before or upon arraignment unless court grants further time, rather than statute providing that a challenge or objection to grand jury may not be made after it has been empaneled and sworn, was applicable in case, and motion to dismiss, based on alleged systematic exclusion of persons of particular race from grand jury which returned indictment, was untimely where court granted defendant additional time in which to file his motion. West's F.S.A. § 905.05; 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.190(c).

4. Criminal Law ⇐1026

Right to appeal denial of motions for discovery, for a hearing, and to dismiss indictment for reason of alleged systematic exclusion of persons of a particular race from grand jury was waived by defendant by failing to diligently pursue matter and by inducing trial court to rule against him when a favorable ruling would have resulted, possibly, in convening of a new grand jury and issuance of a new indictment or at least in a delay of trial for purposes of

discovery or evidentiary hearing or both. U.S.C.A.Const.Amend. 14.

5. Constitutional Law ⇐42.1(3)

Defendant had no standing to make argument that statute upon which life sentences were based arbitrarily established a presumption that death would be appropriate sentence in a felony-murder situation inasmuch as the evidence showed that the defendant was the actual perpetrator of five premeditated murders and that defendant was a first-degree principal in one other murder. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

6. Homicide ⇐354

Finding that defendant had been previously convicted of violent felonies, which justified sentences of death on conviction of six counts of murder, was supported by sufficient evidence. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const. Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

7. Criminal Law ⇐1177

A defendant must be allowed to present evidence pertaining to the degree of his or her involvement in and the circumstances of the events upon which a court imposes death sentences on basis of previous convictions of violent felonies, but this does not compel a conclusion that an act of the court in sustaining an objection to the presentation of such evidence requires vacation of the death sentence in each case. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A. Const.Art. 1, § 9.

8. Criminal Law ⇐1177

Refusal to allow inquiry into background of an aggravated assault conviction which was one of prior violent felonies used to justify sentences of death in case did not warrant vacation of those sentences where defendant made no proffer of his own of matters relating to gravity of his previous criminal activity. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

9. Homicide ⇐354

Finding that capital felonies forming basis of sentences of death in case were especially heinous, atrocious, or cruel could be sustained on basis of mental anguish inflicted on victims as they waited for their "executions" to be carried out. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A. Const.Amends. 5, 14; West's F.S.A.Const. Art. 1, § 9.

10. Homicide ⇐354

Trial court erred in finding that, in committing capital felonies forming basis of sentences of death, defendant knowingly created a great risk of death to many persons was error inasmuch as finding was based on mere speculation that any others who approached house would have been killed. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

11. Homicide ⇐354

In sentencing defendant to death after finding that defendant had been previously convicted of violent felonies, trial court erred by separately considering facts that murders were committed in course of robberies and that they were committed for pecuniary gain; separate consideration of factors that were essentially based on same aspect of crimes was error. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const. Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

12. Homicide ⇐354

Principal against double consideration of a single factor in aggravation was violated by sentencing judge in finding that murders were committed to avoid or prevent a lawful arrest and that they were committed to disrupt or hinder enforcement of the laws. West's F.S.A. §§ 921.141, 921.141(5)(b–h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

13. Criminal Law ⇐996(1.1)

Where the consideration of erroneous aggravating circumstances does not interfere with the weighing process prescribed by statute because there are no mitigating

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14. Homicide ⇐354

Although trial court's sentencing errors resulted in recitation of three statutory aggravating circumstances that were not properly established by evidence, sentences of death were nevertheless warranted, where defendant, twice previously convicted of felonies involving use or threat of violence, was convicted of six premeditated, execution-style murders committed in course of committing robbery and for purpose of eliminating witnesses to crimes of robbery, murders were especially heinous, atrocious, and cruel, there were four statutory aggravating circumstances and there were no mitigating circumstances. West's F.S.A. §§ 921.141, 921.141(5)(b-h); U.S.C.A.Const.Amends. 5, 14; West's F.S.A.Const.Art. 1, § 9.

Bennett H. Brummer, Public Defender, and Warren S. Schwartz, Asst. Public Defender, Miami, for appellant.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

This cause is before the Court on appeal of a judgment of the Circuit Court of the Eleventh Judicial Circuit, Dade County, which adjudicated the appellant guilty of six counts of murder in the first degree, along with additional crimes, pursuant to which six sentences of death were imposed upon him. This Court has jurisdiction of his appeal. Art. V, § 3(b)(1), Fla.Const.

The appellant was convicted on six counts of first-degree murder, two counts of attempted first-degree murder, and three counts of robbery. The evidence showed that in the early evening of July 27, 1977, John Errol Ferguson gained admittance to the home of Livingston Stocker in the Carol City section of Miami by posing as a power company employee. Margaret Wooden was present in the home at the time. After entering, Ferguson bound Wooden's hands and blindfolded her. Then he admitted Beauford White and the appellant Marvin Francois. The three men searched the house for valuables, taking some firearms and some of Margaret Wooden's jewelry. Then the three men covered their faces with masks.

Shortly thereafter Livingston Stocker arrived home with five friends—Henry Clayton, Johnny Hall, Randolph Holmes, Charles Stinson, and Gilbert Williams. The intruders tied the six men up and took their valuables. Still later Michael Miller, Livingston Stocker's nephew, arrived at the house. He too was tied up and robbed.

The appellant's mask then slipped off and he declared that all the victims would have to be killed. Ferguson took Margaret Wooden and Michael Miller into a bedroom and shot them both in the head with a pistol. Appellant Francois took the other six victims into another bedroom, made them lie down on the floor, and shot them each in the head with a shotgun.

After the three attackers departed, Margaret Wooden ran to a neighbor's house to call for help. When the police arrived they found Johnny Hall crawling toward the back door of the house. Both Wooden and Hall survived and testified at trial. The other six victims died. At trial, Johnny Hall identified the appellant as the man who shot him and five others with a shotgun. Theresa Rolle testified that Francois admitted to her his participation in the murders.

Adolpus Archie testified that he took Francois, Ferguson, and White to Stocker's home in his car and waited for them down the street. He testified further that it was unnecessary for him to pick the other three up and drive them away since they departed the scene in Stocker's car. Archie met the other three later and assisted in disposing of evidence. He testified that appellant Francois told him that the real purpose of the venture was not robbery but murder. Francois stated further, according to Archie's testimony, that he and Ferguson had

done the shooting. Archie pled guilty to second-degree murder and received a sentence of twenty years imprisonment.

Prior to trial, appellant moved to dismiss the indictment on the ground that it was issued by a grand jury selected under a procedure that systematically excludes minorities from participation. He moved also for an evidentiary hearing on the motion, and for discovery of the master list from which grand jurors are drawn.

[1] Appellant, in essence, presents three issues on appeal of the judgments of conviction. He contends first that the evidence presented at trial was insufficient to support the judgments of conviction. We find, however, that the judgments were rendered pursuant to jury verdicts that were based on competent, substantial evidence. Appellant's first argument is without merit.

[2] Secondly, appellant argues that he should have been granted a new trial because of newly discovered evidence and because the evidence in question was known to the state at the time of trial but not disclosed to him. Appellant's motion for new trial alleged that shortly before sentencing a woman named Sheila Walker approached defense counsel and said that appellant was with her at 11:00 p.m. on the night of the murders. The motion asserted that this was newly discovered evidence and that the state had suppressed information concerning the identity and whereabouts of this witness. If anyone had known about this witness and her possible value to the accused for alibi purposes, however, it would have been the defendant. Furthermore, the evidence showed that the murders were committed well before 11:00 p.m., so the testimony it was alleged the witness would give would not have been probative and would not have changed the outcome. *See United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Thomas v. State*, 374 So.2d 508 (Fla.1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). Therefore, appellant's contentions on this issue are without merit.

Thirdly, appellant contends that the judgments must be reversed because to try a defendant under an indictment returned by a grand jury from which persons of a particular race have been systematically excluded denies equal protection of the law. Appellant's motion to dismiss alleged that there had been for a number of years a substantial disparity between the percentage of blacks and Hispanics in Dade County's eligible population and the percentage serving on grand juries. He contends that in order for him to have made out a prima facie case of discriminatory selection, which would have required a showing of justification from the state, he needed to have access to the grand jury master list and also should have been afforded an evidentiary hearing.

[3] Appellant argues that his affidavits and proffered exhibits demonstrated a disparity that was unlikely to be due to chance, thus entitling him to discovery of the master list and an evidentiary hearing. *See Castanda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Dykman v. State*, 294 So.2d 633 (Fla.1974); *Rojas v. State*, 288 So.2d 234 (Fla.1973); *Seay v. State*, 286 So.2d 532 (Fla.1973), *cert. denied*, 419 U.S. 847, 95 S.Ct. 84, 42 L.Ed.2d 77 (1974). In response the state argues that the appellant waived his right to raise this issue by not timely filing his motion. The state refers us to section 905.05, Florida Statutes (1977), which provides:

> A challenge or objection to the grand jury may not be made after it has been empaneled and sworn. This section shall not apply to a person who did not know or have reasonable ground to believe, at the time the grand jury was empaneled and sworn, that cases in which he was or might be involved would be investigated by the grand jury.

We find that this statute does not apply to the instant case. Rather, we conclude that the time limit for the filing of the motion to dismiss was governed by Florida Rule of Criminal Procedure 3.190(c), which provides that a motion to dismiss is to be made either before or upon arraignment unless

the court grants further time. The motion here was timely filed because the court granted the appellant additional time in which to file his motion.

[4] Although we find that the motion was timely filed, we hold that appellant waived his right to appeal the denial of his motions for discovery, for a hearing, and to dismiss the indictment, by failing to diligently pursue the matter and by inducing the trial court to rule against him. The record shows that appellant's motion came up for consideration at a pre-trial hearing held January 3, 1978, at which other motions were argued. At that hearing appellant's counsel stated:

> The only other motion that I filed is the motion to dismiss the Grand Jury indictment based on the Blue Ribbon Grand Jury and requesting an evidentiary hearing on that point, but it—I am going to forego any arguments on that. In fact, I am not going to ask for a hearing on it until a later date simply because I do not think there is any way I can get this case to trial by next week.

Transcript of Proceedings, vol. I, at 12–13. Further pre-trial hearings were held on February 21 and 23, 1978, and again the matter was not brought up by defense counsel. On February 27 defense counsel declared that he was ready for trial. However, the trial was not finally scheduled to begin until April 17. On that day defense counsel, Mr. Diamond, brought the motion to dismiss to the court's attention and the following exchange ensued:

> MR. DIAMOND: Your Honor, just before we start on the motion to suppress, I am not sure what pretrial motions have at this point been granted and have not, because of the fact that we have three defendants. Now there are four. Well, four defendants have been charged throughout.
>
> There were motions to adopt based on all motions previously filed. I filed a motion to dismiss the grand jury indictment in this case originally. I believe it was dismissed—I mean, it was not dismissed by this Court. It was dismissed in other courts with regard to these defendants. This Court did not dismiss the indictments against them.
>
> THE COURT: That is true. I find the grand jury was legally constituted, and I deny the motions.
>
> MR. DIAMOND: Fine.

Transcript of Proceedings, vol. I, at 40.

This exchange reveals that defense counsel practically invited the court to rule against him. A favorable ruling on the motion would have resulted, possibly, in the convening of a new grand jury and the issuance of a new indictment, or at least in a delay of the trial for purposes of discovery or an evidentiary hearing or both. Yet the record also reveals that appellant and his counsel did not press for a pretrial ruling because they did not want to delay the trial. The defense tactic was to delay the deciding of the claim of grand jury illegality until just before trial, in hopes of upsetting the conviction on appeal. *See Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). We cannot condone such tactics and therefore refuse to consider this issue on appeal.

Finding no merit in any of appellant's challenges to the convictions, we affirm them.

We come now to consideration of the sentencing proceeding and sentences of death. Appellant presents a series of arguments with regard thereto.

[5] Appellant argues that section 921.141, Florida Statutes (1977), violates due process by arbitrarily establishing a presumption that death is the appropriate sentence in a felony murder situation, because the existence of the underlying felony can be used to aggravate the capital felony. Appellant has no standing to make this argument since the evidence shows that he was the actual perpetrator of five premeditated murders and was a first-degree principal in one other murder. Moreover, we recently rejected this argument when it was presented by an appellant who has

standing to raise it. *White v. State*, 403 So.2d 331 (Fla.1981).

The judge found that appellant had twice previously been convicted of a violent felony, section 921.141(5)(b), Florida Statutes (1977); that in committing the crimes appellant knowingly created a great risk of death to many persons, *Id.* § 921.141(5)(c); that the crime was committed for the purposes of avoiding or preventing lawful arrest and disrupting law enforcement, *Id.* § 921.145(5)(e) & (g); that the crimes were committed during the course of a robbery and for pecuniary gain, *Id.* § 921.141(5)(d) & (f); and that the capital felonies were especially heinous, atrocious, and cruel. *Id.* § 921.141(5)(h). The judge also found that there were no mitigating circumstances.

[6] Appellant contends that the finding that he had been previously convicted of violent felonies was not supported by sufficient evidence. At the sentencing hearing the state called as a witness a court clerk who brought along court files from two prior criminal prosecutions of a person named Marvin Francois. Copies of documents from those files—a judgment of conviction for robbery and a judgment of conviction for aggravated battery and possession of a firearm during a criminal offense—were admitted into evidence. Appellant claims that these documents were an insufficient basis upon which to conclude that he had the prior convictions. He argues that the state should have been required to do more in order to prove beyond a reasonable doubt that he was the same Marvin Francois named in the documents. We disagree and hold that the copies of judgments of conviction for violent felonies naming Marvin Francois as the convicted defendant constituted sufficient proof of the aggravating factor. Appellant could have rebutted the information or challenged the accuracy of the documents had he chosen to try to do so.

In further carrying its burden of showing this aggravating circumstance, the state presented the testimony of the assistant state attorney who had prosecuted appellant on his aggravated assault charge. On cross-examination, defense counsel asked the witness whether the judgment was based upon a negotiated plea with a sentence of probation. The court sustained the state's objection to this inquiry, reasoning that the judgment of conviction spoke for itself in establishing the factor of previous conviction of a violent felony.

[7, 8] Appellant argues that the court erred in not allowing inquiry into the background of the aggravated assault conviction. In *Elledge v. State*, 346 So.2d 998 (Fla.1977), the state at the sentencing hearing called as a witness the relative of the victim of a murder, other than the one for which the defendant was being tried, to testify about the details of the other murder. This Court held that this was appropriate "because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." *Id.* at 1001. Conversely, a defendant must be allowed to present evidence pertaining to the degree of his or her involvement in and the circumstances of the events upon which previous convictions are based. This principle does not compel the conclusion, however, that the court's sustaining the objection requires vacation of the death sentence. The defense made no proffer of its own of matters relating to the gravity of appellant's previous criminal activity. The defendant was of course perfectly free to do so. It would be a different case if the court had excluded evidence proffered by the defendant rebutting the state's evidence of aggravation or relative to any matter in mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Miller v. State*, 332 So.2d 65 (Fla.1976).

[9] The appellant argues that the trial court erred in finding that the capital felonies were especially heinous, atrocious, or cruel. We hold that the finding can be sustained on the basis of the mental anguish inflicted on the victims as they waited for their "executions" to be carried out. *White v. State*, 403 So.2d 331, No. 54,292 (Fla.1981).

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[10] The appellant also argues that the trial court erred in finding that in committing the capital felonies, the appellant knowingly created a great risk of death to many persons. We agree that this finding was error. There were six separate homicides, but the court's conclusion that many other persons were endangered was based on the speculation that any others who approached the house would have been killed. The existence of aggravating circumstances may not be established by speculation. *White v. State*, 403 So.2d 331, (Fla.1981).

[11] The appellant argues further that the trial court erred by separately considering the facts that the murders were committed in the course of robberies and that they were committed for pecuniary gain. Separate consideration of factors that are essentially based on the same aspect of the crimes is error. *White v. State; Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). By finding both statutory aggravating circumstances, the trial court committed such error.

[12] Appellant makes the same kind of "doubling up" argument with respect to the trial court's findings that the murders were committed to avoid or prevent a lawful arrest and that they were committed to disrupt or hinder the enforcement of the laws. Again, we find merit to appellant's argument and hold that the principle against double consideration of a single factor in aggravation was violated by the sentencing judge. *White v. State; Provence v. State*.

[13] Although the trial court's sentencing errors resulted in the recitation of three statutory aggravating circumstances that were not properly established by the evidence, we find that the sentences of death should still be upheld. Where the consideration of erroneous aggravating circumstances does not interfere with the weighing process prescribed by statute because there are no mitigating circumstances to weigh, no resentencing is required. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Elledge v. State*, 346 So.2d 998 (Fla.1977).

[14] The appellant, having been twice previously convicted of felonies involving the use or threat of violence, was convicted of six premeditated, execution-style murders committed in the course of committing robbery, and for the purpose of eliminating the witnesses to his crimes of robbery. The murders were especially heinous, atrocious, and cruel. There were four statutory aggravating circumstances. There were no mitigating circumstances. The jury recommended death. We affirm the judgments of conviction and the sentences of death.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C.J., dissents with an opinion.

SUNDBERG, Chief Justice, dissenting.

I dissent from the majority's refusal to consider the issue of systematic racial underrepresentation on Dade County grand juries. The majority asserts that defense counsel "practically invited the court to rule against him" on the grand jury issue in order to secure a reversal of the conviction on appeal. That is a heady accusation which, to my mind, is unsubstantiated in the record.

On January 3, 1978, counsel for appellant filed a motion to dismiss the indictment and request for evidentiary hearing on the grand jury issue. The motion was accompanied by an impressive array of over seventy pages of affidavits and supporting data. If the record reveals anything, it reveals that appellant wanted to defer consideration of the grand jury claim simply in order to prepare adequately for that and the other numerous issues in this complex trial. When the motion came up for argument (timely, as the majority notes), the court denied it out of hand, without benefit of evidentiary hearing. The trial judge did not find the claim to have been waived, but rather specifically denied it on the merits.

At that point counsel could do no more to assert his claim.

Because I believe appellant proffered material facts to establish a prima facie claim of an illegally composed grand jury, he had a constitutional right to an evidentiary hearing on that issue. *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed.2d 190 (1964); *Dykman v. State*, 294 So.2d 633 (Fla.1973). The majority denies appellant that right because, on the most sparse of records, it perceives that counsel invited that court error. I would not be so quick to impute perfidious motives to defense counsel.

Mark MIKENAS, Appellant,

v.

STATE of Florida, Appellee.

No. 49928.

Supreme Court of Florida.

Nov. 5, 1981.

Rehearing Denied Jan. 28, 1982.

On remand for resentencing following affirmance of defendant's first-degree murder conviction, 367 So.2d 606, the Circuit Court, Hillsborough County, J. C. Cheatwood, J., sentenced defendant to death, and he appealed. The Supreme Court, Adkins, J., held that trial court did not err by refusing to impanel advisory jury, by failing to consider testimony of psychologists and minister concerning defendant's rehabilitation, or by failing to strike all or part of presentence investigation report.

Affirmed.

1. Criminal Law ⇐1192

In imposing death sentence for felony-murder, after remand, trial court did not err by refusing to impanel advisory jury where order of remand did not require further jury deliberations, and where error in court's considering defendant's substantial criminal history as aggravating circumstance instead of as counter to allegation of lack of significant past criminal history as mitigating circumstance was to be corrected by court rather than jury.

2. Criminal Law ⇐1192

In imposing death sentence for felony-murder, following remand, trial court did not err in failing to consider testimony of psychologists and minister relating to defendant's rehabilitation where trial court was not required to give weight to such testimony as mitigating circumstances and defendant had been afforded ample opportunity to present evidence in mitigation in original sentencing proceeding.

3. Criminal Law ⇐986.2(1)

In imposing death sentence for robbery-murder, trial court did not err in stating in its finding concerning aggravating circumstances that pecuniary gain circumstance would be considered in conjunction with robbery circumstance where only robbery circumstance was found to be aggravating circumstance.

4. Criminal Law ⇐986.4(1)

In imposing death sentence for felony-murder, trial court did not err in failing to strike all or part of presentence investigation report where defendant was provided opportunity to rebut and trial court was entitled to draw its own conclusion in capital cases from information in report. West's F.S.A. Rules Crim.Proc., Rule 3.710.

Judge C. Luckey, Jr., Public Defender for the Thirteenth Judicial Circuit, Bruce P. Cury, Chief Asst. Public Defender, Tampa, and Jerry Hill, Public Defender for the Tenth Judicial Circuit, Bartow, for appellant.

Jim Smith, Atty. Gen. and Eula Tuttle Mason, Asst. Atty. Gen., Tampa, for appellee.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: 77-28650 (Fuller)

THE STATE OF FLORIDA,

Plaintiff,

vs.

MARVIN FRANCOIS,

Defendant.

MOTION TO DISMISS THE INDICTMENT BASED UPON THE ILLEGAL COMPOSITION OF THE GRAND JURY; FOR AN EVIDENTIARY HEARING; AND FOR THE DISCOVERY OF CERTAIN MATTERS RELATING TO GRAND JURY COMPOSITION

COMES NOW the Defendant, MARVIN FRANCOIS, by and through his undersigned attorney, pursuant to RCrP 3.190, and moves this Honorable Court to:

1) Dismiss the Indictment.

2) Hold an Evidentiary Hearing to determine the legality of the Grand Jury composition and the selection procedure utilized for such composition.

3) Order discovery of the following matters:

(a) The names, addresses and voter registration numbers of all persons on each Grand Jury Master List since and including 1973.

(b) All documents in the possession of the Clerk of the Circuit Court and/or the Grand Jury Commission describing the system used in selecting each Grand Jury Master List down through the selection of the actual Grand Jury, including a sample of any form questionnaires or affidavits utilized to interview or screen potential Grand Jurors. The documents should include any documents describing the reduction of prospective Grand Jurors (1) from those on the voter registration list to the Grand Jury Master List of 500 and (2) from the Grand Jury Master List to the actual Grand Jury. All documents describing the process utilized for all judicial nominations and all

documents setting forth the names of all persons who at any stage in the selection process were nominated by judges should also be included. The above requested discovery should be made in camera and with such safeguards as the Court deems just.

The grounds for this Motion are as follows:

(a) The Grand Jury is illegally constituted as being in violation of the Defendant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2, 9 and 15 of the Constitution of the State of Florida. Said Grand Jury is illegally constituted based upon the following reasons:

1) There is currently a marked disparity between the percentages of persons of African and Latin American descent qualified to serve, and the percentages of such persons actually on the Grand Jury Master List of five hundred names from which the Grand Jury was selected.

2) There has been the same marked disparities between the percentages of persons of African or Latin American descent qualified to serve and the corresponding percentages actually on the Grand Jury Master List of five hundred names for each year shown, i.e., 1973 through 1977.

3) The Grand Jury selection procedures set forth in Chapter 57-550 as amended by Chapter 70-1000, Laws of Florida perm and in fact necessitate, the racial identification of potential juro during the selection of the Grand Jury list. The procedures inherently encourage the Jury Commissioners to select potential Grand Jurors on the basis of personal friendship or acquaintanceship.

4) The Grand Jury selection procedures are designed to and result in Grand Jury lists which under-represent pers

of African and Latin American descent and other cognizable classes. The procedures seem to guarantee that even those few members of these classes who may appear on the lists are not fair representatives of the classes involved.

(b) An Evidentiary Hearing is necessary to present evidence to establish the above allegations beyond any doubt. The evidence that will be presented is outlined in the Offer of Proof.

(c) The sought after discovery is essential to the proof of the above allegations and without such discovery a fair and full hearing on the Constitutional issues cannot be had.

OFFER OF PROOF

I. Statistical Evidence of Disparities.

The Defendant will show by comparing the following percentages of persons of African or Latin American descent:

(a) percentage of population of Dade County (Source: Dept., of Commerce Census Bureau figures)

(b) percentage of registered voters (1973 - 1977) (Source: Dade County Department of Elections)

(c) percentage of Grand Jury Master Lists (1973 - 1977) (Source: the names, addresses and voter registration numbers of the people constituting the lists are in the possession of the Grand Jury Commission and the Clerk of the Circuit Court. After this information is obtained the required demographic data will then be obtained from the Dade County Department of Elections or via a questionnaire)

(d) percentage of Grand Jurors (1973 - 1977)

(Source: The names and addresses of actual Grand Jurors were obtained from the Clerk of the Circuit Court. The corresponding demographic data was obtained from the Dade County Department of Elections)

The attached chart, Racial Composition of Dade County Grand Jurys (Exhibit A) is based on data obtained from the Clerk of the Circuit Court and the Dade County Dept., of Elections and the Cencus Bureau. The chart indicates a marked disparity between the percentages of African or Latin American descent who actually served on Grand Jurys. The exact percentages of persons of African or Latin American descent on the Grand Jury Master Lists cannot be exactly ascertained until the sought after discovery is obtained; these percentages can, however, be estimated with a high degree of statistical accuracy. There is a marked disparity between these estimated percentages and the corresponding registered voter and general population percentages.

The manner in which the chart was prepared and the interpretation of the figures therein is set forth in the attached affidavits of Mr. Joseph Kelinson, Dr. S. Shapiro and Dr. Neumann. (Exhibits B, C and D.)

II. Evidence of Existence of Cognizable Classes.

Persons of African and Latin American descent tend to differ from Non-Latin Whites in both attitudinal and demographic variables and their adequate representation on the Grand Jury would make a real difference in the performance of the Grand Jury.

The following examples of demographic differences are taken from Profile of the Latin Population in the Metropolitan Dade County Area. Office of the County Manager, Fall 1976 which is here' incorporated into this Motion as Exhibit E.

Socio - Economic Status

	Black	Spanish Speaking	Non-Latin Whites
Median Family Income:	$ 5,983	$ 8,091	$ 10,563
Percent of Families below Poverty:	27.7%	13.8%	6.8%
Median School Years Attained (population 25+):	9.4	10.4	12.2
Percent Overcrowded Housing (1.01 persons plus per room):	33.1	32.6	5.2

Overcrowded Housing

Housing Unit Occupancy

Persons per room:	Black	Latin	Other
1.01 to 1.50:	15.4%	14.4%	3.0%
1.51 and over:	17.7	18.2	2.2
Total Overcrowded	13.1%	32.6%	5.2%

Income Sources

Per Capita Income

	Blacks	Latins	Non-Latin Whites
Wages and Salaries:	$ 1,481	$ 2,107	$ 2,998
Non-Farm Self-Employment:	59	162	379
Farm Self-Employment:	3	7	8
Social Security & Retirement:	47	32	205
Public Assistance:	32	35	8
All Other:	57	96	715
TOTAL Median Earned Income:	$ 1,678	$ 2,439	$ 4,314

Persons per Household

	Persons per Household	**Persons per Family**
Latin:	3.61	3.80
Black:	3.73	4.27
Non-Latin Whites:	2.57	3.08

Sub-Families:

Census data on "sub-families" gives us some idea of the extent which Latins have taken others into their homes for economic, or other reasons A "sub-family" is one which is related to the head of the primary family living in a residence.

	Husband-Wife Sub-families as a percent of husband-wife total families
Latin:	7.2%
Black	2.5%
Non-Latin Whites	1.7%

Percentage of Distribution of Workers by Industry

Male	Latin	Black	Non-Latin
Agriculture:	1.8%	5.9%	1.5%
Mining:	0.2	0.2	0.2
Construction:	8.6	16.9	10.4
Manufacturing:			
Durable:	15.0	4.9	5.6
Non-Durable:	11.0	4.2	4.8
Transportation:	8.2	15.7	15.5
Wholesale and Retail Trade:	26.8	22.7	23.9
Finance, Insurance & Real Estate:	3.7	2.7	7.3
Business & Repair Services:	5.8	4.4	5.7
Personal Services:	8.2	6.8	4.4
Entertainment & Recretational Services:	1.4	1.3	1.9
Professional & Related Services:	7.7	9.5	11.8
Public Administration:	1.6	4.8	7.0
	100%	100%	100%

Female			
Agriculture	0.8%	3.5%	0.7%
Mining:	0.1	-	-
Construction:	0.6	0.5	1.5
Manufacturing:			
Durable:	7.4	1.8	3.2
Non-Durable:	32.6	3.9	4.4
Transportation:	3.8	3.9	9.4
Wholesale & Retail Trade:	19.0	13.1	26.5
Finance, Insurance & Real Estate:	6.0	2.6	10.0
Business & Repair Services:	3.1	1.5	3.4
Personal Services:	11.8	6.8	4.4
Entertainment & Recretational Services:	0.5	0.7	1.5
Professional & Related Services:	13.2	30.6	28.6
Public Administration:	1.1	2.8	3.7
	100%	100%	100%

Occupations by Ethnicity and Sex - 1

	Latin	Black	Non-Lat Whites
Professional & Technical:	9.8%	4.8%	17.1%
Managers & Administrators:	8.5	3.1	14.5
Sales:	7.8	2.0	11.9
Clerical:	9.4	5.6	9.1
Operatives (including transportation):	20.7	23.4	9.0
Other Blue Collar:	29.1	41.1	27.1
Farm Workers:	1.0	2.6	0.4
Service Workers (except private household):	13.4	29.0	14.6
Private Household Workers:	2.0	26.6	1.1
TOTAL:	100%	100%	100%

Occupations by Ethnicity and Sex - 197

	Latin	Black	Non-Latin Whites
Female			
Professional & Technical:	6.5%	8.7%	16.9%
Managers & Administrators	1.8	1.0	5.5
Sales:	5.7	2.5	9.6
Clerical	27.7	16.9	44.4
Operatives:			
(including transportation):	38.1	10.2	5.3
Other Blue Collar	4.2	2.5	2.2
Farm Workers:	0.6	2.6	0.4
Service Workers:			
(except private household)	13.4	29.0	14.6
Private Household Workers:	2.0	26.6	1.1
TOTAL	100%	100%	100%

III Grand Jury Selection Procedures.

Chapter 57-500 as amended by Chapter 70-1000 Laws of Florida provides that the Circuit Judges for Dade County shall devise the Grand Jury Master List as prepared as follows: Each judge is asked to submit the names and addresses of a number of person with whom he is acquainted and who meet the statutory requirements for jury service. A list of five hundred such names is collected and the names are placed in the Grand Jury Box. The judge in charge of the Grand Jury draws from the Grand Jury Box a sufficient number of names to constitute the Grand Jury.

Throughout the period 1973 - 1977 and prior to that time there were no Circuit Court Judges of African or Latin American descent in Dade County. At the present time, out of 46 Circuit Judges there is only one Circuit Judge of African descent and none of the Latin American descent.

As more fully set forth in the attached Affidavit of Mr. Joseph Kelinson (Exhibit B) and the attached chart Demographic Characteristics of Census Tracts of Circuit Court Judges (Exhibit E) the Circuit Court Judges tend to reside in census tracts where there is

a low percentage of persons of African or Latin American descent. Judges like all other people tend to reside in neighborhoods consisting of residents of the same race and socio-economic status.

What becomes painfully apparent is the fact that there is a vast source of discord with regard to the lack of a fair cross-section representation of the citizens of Dade County to serve as members of the Grand Jury.

The Dade County Community Relations Board has conducted numerous hearings and has done considerable research on this precise issue or complaint. In December, 1976, the Dade County Community Relations Board undertook discussion of the problem: "Is the Grand Jury composition an unfair representation of the community?" (See Exhibit F).

Again, in January, 1977, the Dade County Community Relations Board had discussion on "The selection process for the Grand Jury: Part II". (See Exhibit G).

In March, 1977, after full hearings and discussions, wherein numerous prominent and learned individuals were invited and, in fact, did speak, the Dade County Community Relations Board published its Special Report No. FY-77-3, with its findings and recommendations. The Report speaks for itself with regard to its findings of disproportionate and gross lacking of representation of identifiable minority groups (See Exhibit H).

In addition thereto, see Exhibit I, which is a City of Miami Resolution, which was adopted to "urge the Grand Jury Commission to take steps which would insure greater participation on the Grand Jury by our black and Latin citizens".

It is, therefore, respectfully submitted that the problem complained of as enumerated in this motion is one of wide concern and applicability, and counsel most respectfully feels and requests that

this most Honorable tribunal consider all of the aforementioned allegations, pleadings, affidavits, exhibits and proof to determine this most justifiable issue.

WHEREFORE, it is respectfully submitted that a prima facie case of discrimination has been presented and it is prayed that the Court would dismiss the Indictment or, in the alternative, hold an Evidentiary Hearing and order disclosure of the sought after discovery, and require the State to now offer credible, sufficient evidence to overcome and rebut this prima facie case as established.

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail/hand to the office of RICHARD E. GERSTEIN, State Attorney, 1351 Northwest 12th Street, Miami, Florida, 33125, this 7 day of January, 1971.

Respectfully submitted,

NATHAN P. DIAMOND, ESQUIRE, of
PENZELL & DIAMOND, P.A.,
Douglas Center, Suite 602,
2600 Southwest 37th Avenue,
Coral Gables, Florida, 33134
Telephone: 448-4496

AFFIDAVIT OF NATHAN DIAMOND

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

BEFORE ME the undersigned authority did personally appear NATHAN DIAMOND who after bein duly sworn upon oath deposes and says:

1. I am a member of the Florida Bar and served as trial counsel for and on behalf of Marvin Francois in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Criminal Division, in the case of State of Florida, Plaintiff, vs. Marvin Francois, Defendant, Case No. 77-28650.

2. On January 3, 1978 I filed, on behalf of Defendant, Marvin Francois, a motion designated "Motion to Dismiss the Indictment Based Upon the Illegal Composition of the Grand Jury; for an Evidentiary Hearing; and for the Discovery of Certain Matters Relating to Grand Jury Composition".

Attached to said motion were nine exhibits, identified as Exhibits "A thru I". Said exhibits were filed contemporaneously with, and were referred to, in the said motion. A true and correct copy of said exhibits, as filed with the Clerk of the Circuit Court are attached hereto.

FURTHER AFFIANT sayeth not.

NATHAN DIAMOND

Sworn and subscribed before me this 1 day of December 1978

Notary Public
State of Florida at Large

My commission expires:

RACIAL COMPOSITION OF DADE COUNTY GRAND JURY

YEAR	GENERAL POPULATION		REGISTERED VOTERS		GRAND JURY [illegible]		ACTUAL GRAND JURY		DISPARITY BETWEEN REG. VOTERS & GRAND JURY			
	BB	BL	BB	BL	BB	BL	BB	BL	BD	BL	BB	BL
1970	15.2	23.6										
1973 (spring)			13.0%	EST 8.0	(EST)	(EST)						
1973 (fall)			13.0%	EST 8.0	4.0%	3.0%	0%	4.3%			100.0%	45.6%
1974 (spring)			13.5%	EST 8.0	4.0%	3.0%	4.3%	4.3%			67.8%	45.6%
1974 (fall)			13.5%	EST 8.0	4.0%	3.0%	0%	4.3%			100.0%	45.6%
1975 (spring)			14.1%	8.9%	4.0%	3.0%	0%	4.3%			100.0%	51.2%
1975 (fall)			14.1%	8.9%	4.0%	3.0%	4.3%	0%			51.2%	100%
1976 (spring)			13.8%	10.2%	4.0%	3.0%	8.7%	0%			37.0%	100%
1976 (fall)			13.8%	10.2%	4.0%	3.0%	4.3%	0%			68.5%	100%
1977 (spring)			15.2%	12.6%	4.0%	3.0%	13.0%	0%			14.5%	100%
1980	(EST) 14.5	(EST) 38.3										

AVERAGE UNDERREPRESENTATION OF PERSONS OF AFRICAN DESCENT = 67.4%

AVERAGE UNDERREPRESENTATION OF PERSONS OF LATIN AMERICAN DESCENT = 73.5%

EXHIBIT "A"

THE STATE OF FLORIDA,	:	IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
Plaintiff,	:	CRIMINAL DIVISION
-vs-	:	CASE NO. 77- (Judge Baker) 25171 (A)
RICHARD HENRY MARLOWE,	:	AFFIDAVIT OF JOSEPH H. KELINSON
Defendant.	:	

STATE OF FLORIDA)

COUNTY OF DADE)

I, JOSEPH H. KELINSON, am an attorney in the offices of Mechanic & Goldstein. I gathered together the data on which Exhibit "A" is based. I obtained copies of the 1973-1977 Grand Juries from the Office of the Clerk of the Circuit Court.

I obtained the voter registration statistics from the office of the Dade County Board of Elections at 1400 Biscayne Boulevard.

I obtained information concerning the racial composition of the 1973-1977 Grand Juries from the Office of the Clerk of the Circuit Court.

I asked for a copy of the Grand Jury Master List for the above years but was refused it by the Office of the Clerk of the Circuit Court.

JOSEPH H. KELINSON

SWORN TO and SUBSCRIBED before me this 4th day of October, 1977.

NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JUNE 19 1979
BONDED THRU GENERAL INSURANCE UNDERWRITERS

EXHIBIT "B"

AFFIDAVIT

My name is Dr. Samuel S. Shapiro. I am a statistician and am employed as the chairman of the Department of Mathematical Sciences at Florida International University, Miami, Florida, 33199. I have had prior experience as an expert in a case involving racial discrimination in the U.S. Federal Court in Philadelphia, Pennsylvania and have testified previously in Dade County regarding discrimination in Grand Jury selection.

Based upon the data supplied to me by Stephen Mechanic, which is appended to this statement, Exhibit A, I have determined the probability that the proportion of blacks and Latins chosen for the Grand Jury for the years indicated could have occurred from a random selection of registered voters. The probability of by chance selecting only 8 blacks out of 184 jurors out of the population of registered voters that averaged 13.9% black is less than .001 or less than one chance out of a thousand. The corresponding probability for choosing only 4 Latins from a population of registered voters that averaged 9.4% is also less than .001. Together as a group the probability of selecting by chance only 12 Latins and blacks out of 184 jurors out of a population of registered voters made up of 23.1% blacks and Latins is far less than .001. Therefore, one can conclude that both blacks and Latins are under-represented in the composition of Grand Juries.

Dr. Samuel S. Shapiro, Ph.D.

SWORN AND SUBSCRIBED before me this 3 day of October 1977 A.D.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MARCH 11 1980

Notary Public

NAME	SEX	RACE	DATE OF BIRTH
FRANCO, MICHAEL J.	M	W	10-29-11
ANS, CAROLYN H.	F	W	12-18-13
RAND, GERTRUDE G.	F	W	00-00-13
CRAWFORD, WYNELLE	F	W	6-06-14
DREW, HORACE E.	M	W	00-00-16
AKERMAN, JOSEPH	M	W	2-04-13
BARNES, GROVER C.	M	W	12-23-26
BOOKS, CHARLIE B.	M	W	6-17-09
OWN, ALVIN LLOYD	M	W	11-05-34
PPS, DOYNE MEDFORD	M	W	8-28-13
LSTRAP, BARBARA LAMOR	F	W	4-20-34
ORMAN, IRVING	M	W	12-03-13
HORTON, CHARLOTTE C.	F	W	00-00-27
MABRY, CLYDE	M	W	11-28-06
ENKEN, HELEN	F	W	2-22-03
METTS, RICHARD	M	W	12-03-28
MORENO, MARGARET SUE	F	W	1-18-47
SCHLOSSMAN, ARTHUR	M	W	1-21-11
SIMKOVIC, SIMON	M	W	00-00-30
SOTTILE, WILLIAM	M	W	2-08-17
STROZIER, JANESSE A.	F	W	11-02-21
TOPMILLER, CHARLES H.	M	W	8-17-10

ROSE, DAVID - Unable to identify due to insufficient information.

NO LATIN SURNAMES
NO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
STOVER, ANN S.	F	W	9-8-10
COOPER, R. BELVIN	M	W	9-28-23
GREENOP, EDWARD C.	M	W	6-18-22
MOORE, PHILIP	M	W	7-03-07
PALANT, TED	M	W	7-7-33
BELCHER, VICTORIA E.	F	W	11-4-34
BLANCHARD, TOWNSEND H.	M	W	3-1-26
FISHER, MAX	M	W	5-20-10
GERSON, DENISE M.	F	W	9-17-45
HEYDER, HELEN R.	F	W	4-12-27
JAFFE, ARTHUR	M	W	3-26-25
LUSTGARTEN, BRUCE A.	M	W	4-22-31
PORTANTE, JR., PETER A.	M	W	2-6-37
ROSNER, SONDRA G.	F	W	7-11-36
SANCHEZ, CHRISTINA	F	W	10-20-47
SCHWARZ, ARLENE J.	F	W	4-6-43
SLATON, RALPH D.	M	W	8-04-20
STEPHENS, IRVIN J.	M	W	5-1-10
THOMPSON, BETSY S.	F	W	7-2-09
VAN LEER, EDWIN D.	M	W	2-14-48
WILLIAMS, CARL A.	M	B	9-9-24

BAILEY, JULIA LEE - Unable to identify due to insufficient information.

VENDETTA, GLORIA M. - Unable to identify due to insufficient information.

TWO LATIN SURNAMES
ONE BLACK

GRAND JURY - FALL TERM 1974

NAME	SEX	RACE	DATE OF BIRTH
ABBESS, LEONARD L	M	W	3-28-04
GARDNER, JOSEPH T.	M	W	0-0-17
CESARANO, PATRICK J.	M	W	2-26-12
JASPER, THELMA	F	W	6-30-22
ARMALY, JOSEPH W.	M	W	11-19-26
ALMEIDA, FRANCISCO	M	W	12-25-31
BENNETT, RICHARD LEE	M	W	6-22-52
BOGGS, RICHARD	M	W	1-13-03
BOROUGHS JR., SAMUEL C.	M	W	12-24-12
COLE, SAMUEL T.	M	W	0-0-32
KROLL, EDWARD	M	W	8-21-09
LARIVIERE, AGNES HERRING	F	W	9-22-15
MC GAHEY, MARY	F	W	1-17-14
MILLER, ARTHUR W.	M	W	4-26-20
NOPPENBERG, JOHN L.	M	W	0-0-17
PETRUCCI, JANNY	F	W	10-18-42
PRIME JR., EDWARD L.	M	W	10-18-24
RAWLS, ROBERT G.	M	W	6-22-07
ROBERIO, GEORGE M.	M	W	10-19-09
SALMATE, J. BERNARD	M	W	0-0-09
THATCHER, JOHN W.	M	W	0-0-27
THOMPSON, JAMES G.	M	W	10-10-21
WALKER, PAUL S.	M	W	8-10-14

TWO LATIN SURNAMES
NO BLACKS

GRAND JURY - SPRING TERM 1975

NAME	SEX	RACE	DATE OF BIRTH
VANN, HAROLD R.	M	W	6-27-15
LUDDER, CARSTEN H.	M	W	0-0-22
MC NAUGHTON, VIRGINIA	F	W	1-25-30
GREENE, JUDITH M.	F	W	11-10-39
GALLAGHER, PHIL C.	M	W	0-0-26
ABESS, LEONARD, JR.	M	W	7-22-48
ARONOFF, AARON	M	W	8-2-21
BARRETO, ROGER J.	M	W	12-7-21
BOLLES, STEPHEN	M	W	12-6-49
COE, CONNIE	F	W	4-27-10
HUBERMAN, BEATRICE G.	F	W	12-2-11
JURESKI, WALTER	M	W	12-31-19
KORGE, GEORGE J.	M	W	1-30-18
NASH, DELORES A.	F	W	9-15-25
PLAGER, MORTON	M	W	1-15-25
RAFKIN, MAX	M	W	3-11-99
SCHAEFER, MARJORIE	F	W	0-0-18
SEERTH, ADOLPH	M	W	10-12-95
SILVERMAN, JENINE	F	W	9-16-42
WATSON, CHARLES R.	M	W	6-18-25
WITKIND, ELLIOT	M	W	7-27-22
VON ZAMFT, SANDRA	F	W	9-10-48

MADIN, JOAN - Unable to identify due to insufficient information.

SIMON, SAMUEL -Unable to identify due to insufficient information.

ONE LATIN SURNAME
NO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
GILL, DANIEL K.	M	W	4-17-23
SMITH, JANE SEVIER	F	W	8-21-38
JACKSON, HAROLD M.	M	W	6-21-16
DeMARCO, ALEXANDER J.	M	W	6-3-19
SIMON, MARILYN	F	W	0-0-33
ALBERT, LESTER	M	B	11-21-20
BERNE, GEORGE R.	M	"	3-22-99
BOLGER, JAMES L.	M	"	7-21-03
BOOZ, ELIZABETH G.	F	"	7-8-11
COLLINS, STEPHAN C.	M	"	0-0-14
EFTHIMIOU, LOLA	F	"	7-5-03
FOGARTY, RAYMOND F.	M	"	11-25-20
HARLOW, JOHN R.	M	"	3-11-24
HARRISON, EDWARD R.	M	"	4-3-35
HODGES, CHARLES G., JR.	M	"	1-6-20
HOEHN, SCOTT J.	M	"	3-27-33
ISAN, JERRY	M	"	1-3-32
JONES, ELA P.	F	"	0-0-15
KANTER, NANCY	F	"	8-29-28
MILLER, DEAN R.	M	"	0-0-19
PRINCE, ELBERT R., JR.	M	"	8-26-20
SCHWARZBART, GUNTER	M	"	0-0-32
SUBERS, JEAN DORIS	F	"	0-0-16

NO LATIN SURNAMES
ONE BLACK

GRAND JURY - SPRING TERM 1976

NAME	SEX	RACE	DATE OF BIRTH
KRONISH, LEON	M	W	2-21-17
MOONEY, OTTIS A.	M	W	11-21-24
LANGER, SIDNEY W.	M	W	0-0-00
GAYNOR, MILTON M.	M	W	7-6-17
BOLEN, BUNYON D.	M	W	2-16-23
CANNON, RUTH C.	F	W	9-3-23
CLASBY, NANCY	F	W	9-21-38
COLEMAN, DAVID C., JR.	M	W	11-30-17
CORNELIUS, EUGENE C.	M	W	0-0-12
HALPERN, FAYE R.	F	W	1-4-21
HAUSMANN, DONALD J.	M	W	3-3-24
HENRY, C. J.	M	B	11-25-31
JONES, CLARKE	M	W	3-24-29
KELLER, JUNE	F	W	0-0-24
LABATON, ANN	F	W	6-25-26
MAMLIN, BETTY JEAN	F	W	3-8-25
MANDEL, SOL C.	M	W	4-23-29
MEYER, MARGARET	F	W	5-10-22
MILLER, SHIRLEY W.	F	W	12-16-17
MOZO, RALPH M.	M	W	10-18-12
SINGER, ALBERT H.	M	W	11-30-02
WARSHAW, BERT	M	W	6-2-25
YOUNG, FREDERICK R.	M	W	0-0-00

NO LATIN SURNAMES
TWO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
PHILPITT, MARSHALL	M	W	0-0-22
CAESAR, JACK R.	M	W	12-6-19
STURM, ANNE	F	W	0-0-16
CROW, PATRICIA L.	F	W	0-0-27
ARGO, JAMES THOMAS	M	W	2-13-15
BARNES, A. DOUGLAS	M	W	4-22-03
BUDDE, EVELYN J.	F	W	7-8-36
CONDERMANN, SUE	F	W	7-27-38
CORBETT, GEORGE R.	M	W	10-12-47
CORDRAY, ANN	F	W	11-28-22
CORNELIUS, GEORGE R.	M	W	10-14-25
CORSETT, WINFRED	M	B	11-9-21
EPSTEIN, JOY R.	F	W	9-23-26
HEGGEN, VIRGINIA	F	W	10-4-26
HOYT, CLYDE R.	M	W	7-25-20
LEVITT, RONALD	M	W	3-23-31
MC GAHEY, KENT C.	M	W	5-19-40
NEAL, MARY E.	F	W	4-1-08
PALLOT, ROSALIND W.	F	W	3-14-34
QUENTIN, RUTH	F	W	1-16-19
SAMUELS, ERNEST	M	W	7-9-25
SIPKIN, GEORGE	M	W	7-2-04

POLANSKY, RANDY - Unable to identify due to insufficient information.

ONE LATIN SURNAME
ONE BLACK

GRAND JURY - SPRING TERM 1977

NAME	SEX	RACE	DATE OF BIRTH
BUCHANAN, FRANK M.	M	W	8-21-19
DEETS, OLIVIA S.	F	W	2-21-30
ANDREWS, JOYCE E.	F	W	7-10-33
CALHOUN, MIKE	M	W	3-13-27
BRYAN, RICHARD MARVIN	M	W	0-0-22
COGDELL, WALTER C.	M	B	7-29-99
CORNELIUS, HELEN A.	F	W	8-6-20
FEICK, DANIEL B.	M	W	9-14-34
FINCHER, DAVID	M	B	2-16-34
FRITZ, DAWN E.	F	W	9-29-55
GITTLEMAN, JOSEPH	M	W	3-6-21
HENRY, MARGARET M.	F	B	6-29-34
JASPER, HARRY W.	M	W	12-15-06
JOHNSON, LILLIAN M.	F	W	1-16-04
KANNER, MARCIA J.	F	W	8-24-35
KOCH, JACK D.	M	W	6-13-12
LEHFELDT, JANE	F	W	7-14-16
LONGO, C. JOHN	M	W	8-11-24
SAMWAY, J.MICHAEL	M	W	3-22-37
SMITH, THOMAS	M	W	0-0-26
STOKES, WALTER J.	M	W	9-19-12
WALLER, M. L., JR. (LEE)	M	W	12-7-24
WORONER, MURRY	M	W	8-21-13

NO LATIN SURNAMES
THREE BLACKS

EXHIBIT "D"

A F F A D A V I T

My name is Dr. Paul G. Neumann. I am an Assistant Professor and Director of Experimental Training in the Department of Psychology of the University of Miami. I am a statistician and teach statistics at the graduate level.

Based upon data supplied to me by Stephen Mechanic for the periods Fall, 1973 to Spring, 1977, inclusive, a copy of which is attached to this affadavit, I have calculated the probability that the proportions of Blacks and Latins actually represented on the Dade County, Florida Grand Jury during these eight periods represented by the data could have been randomly selected from a population with the proportions of Blacks and Latins as represented in the data for Registered Voters in Dade County, Florida for the eight periods. I have determined that the probability that the composition of the Grand Juries for these periods represents a random selection is less than .005 or less than five in one-thousand. Any probability of less than five in one-hundred is considered a statistically-significant departure from chance. Therefore, it can be concluded that Blacks and Latins are significantly under-represented in the composition of Dade County, Florida Grand Juried for the period Fall, 1973 to Spring 1977.

Dr. Paul G. Neumann

STATE OF FLORIDA)
COUNTY OF DADE) ss

Signed before me this 3 day of October, 1977 at Coral Gables, Florida.

Marcia Burros, Notary Public

Notary Public, State of Florida at Large.
My Commission Expires June 24, 1978.

NAME	SEX	RACE	DATE OF BIRTH
FRANCO, MICHAEL J.	M	W	10-29-11
EVANS, CAROLYN H.	F	W	12-18-13
RAND, GERTRUDE G.	F	W	00-00-13
CRAWFORD, WYNELLE	F	W	6-06-14
DREW, HORACE E.	M	W	00-00-16
AKERMAN, JOSEPH	M	W	3-04-13
BARNES, GROVER C.	M	W	12-23-05
BROOKS, CHARLIE B.	M	W	6-17-09
BROWN, ALVIN LLOYD	M	W	11-05-04
CAPPS, DOYNE MEDFORD	M	W	8-28-13
GILSTRAP, BARBARA LAMOR	F	W	4-20-34
GORMAN, IRVING	M	W	11-03-13
HORTON, CHARLOTTE C.	F	W	00-00-07
MABRY, CLYDE	M	W	12-28-06
MENKEN, HELEN	F	W	3-12-03
METTS, RICHARD	M	W	12-03-08
MORENO, MARGARET SUE	F	W	1-13-47
SCHLOSSMAN, ARTHUR	M	W	1-03-11
SIMKOVIC, SIMON	M	W	00-00-00
SOTTILE, WILLIAM	M	W	3-08-17
STROZIER, VENESSE A.	F	W	11-08-21
TOPMILLER, CHARLES F.	M	W	8-17-13

ROSE, DAVID - Unable to identify due to insufficient information.

NO LATIN SURNAMES
NO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
TOVER, ANN S.	F	W	9-8-10
COOPER, R. BELVIN	M	W	9-28-23
GREENOP, EDWARD C.	M	W	6-18-22
MOORE, PHILIP	M	W	7-03-07
PALANT, TED	M	W	7-7-33
BELCHER, VICTORIA E.	F	W	11-4-14
BLANCHARD, TOWNSEND H.	M	W	3-1-26
FISHER, MAX	M	W	5-20-10
GERSON, DENISE M.	F	W	3-17-48
HEYDER, HELEN R.	F	W	4-12-27
JAFFE, ARTHUR	M	W	3-26-25
LUSTGARTEN, BRUCE A.	M	W	4-22-31
PORTANTE, JR., PETER A.	M	W	2-6-27
ROSNER, SONORA S.	F	W	7-11-26
SANCHEZ, CHRISTINA	F	W	12-20-47
SCHWARZ, ARLENE J.	F	W	4-6-43
SLATON, RALPH D.	M	W	8-24-20
STEPHENS, IRVIN J.	M	W	5-1-10
THOMPSON, BETSY S.	F	W	7-2-29
VAN LEER, EDWIN D.	M	W	3-14-48
WILLIAMS, CARL A.	M	B	3-3-24

BAILEY, JULIA LEE - Unable to identify due to insufficient information.

VENDETTA, GLORIA M. - Unable to identify due to insufficient information.

TWO LATIN SURNAMES
ONE BLACK

NAME	SEX	RACE	DATE OF BIRTH
ABBESS, LEONARD L	M	W	3-28-04
GARDNER, JOSEPH T.	M	W	0-0-17
CESARANO, PATRICK J.	M	W	2-26-12
JASPER, THELMA	F	W	6-30-22
ARMALY, JOSEPH W.	M	W	11-19-36
ALMEIDA, FRANCISCO	M	W	12-26-31
BENNETT, RICHARD LEE	M	W	6-22-52
BOGGS, RICHARD	M	W	1-10-08
BOROUGHS JR., SAMUEL C.	M	W	12-24-12
COLE, SAMUEL T.	M	W	0-0-22
KROLL, EDWARD	M	W	8-01-09
LARIMORE, AGNES HERRING	F	W	9-22-15
MC GAHEY, MARY	F	W	1-17-04
MILLER, ARTHUR V.	M	W	4-25-29
NOPPENBERG, JOHN L.	M	W	0-0-17
PETRUCCI, JANNY	F	W	10-19-42
PRIME JR., EDWARD L.	M	W	10-18-04
RAWLS, ROBERT O.	M	W	8-22-27
ROBERTS, GEORGE H.	M	W	12-16-08
SALMATE, J. BERNARD	M	W	0-0-29
THATCHER, JOHN V.	M	W	0-0-27
THOMPSON, JAMES S.	M	W	10-10-21
WALKER, PAUL S.	M	W	5-10-14

TWO LATIN SURNAMES
NO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
WANN, HAROLD R.	M	W	6-27-15
LUDDER, CARSTEN H.	M	W	0-0-22
MC NAUGHTON, VIRGINIA	F	W	7-25-30
GREENE, JUDITH H.	F	W	11-10-39
GALLAGHER, PHIL C.	M	W	0-0-26
ABESS, LEONARD, JR.	M	W	7-23-48
ARONOFF, AARON	M	W	8-2-21
BARRETO, ROGER J.	M	W	12-9-21
BOLLES, STEPHEN	M	W	12-6-49
COE, CONNIE	F	W	4-27-10
HUBERMAN, BEATRICE B.	F	W	12-3-11
JUREIKI, WALTER	M	W	12-21-19
KORGE, GEORGE J.	M	W	1-30-18
KOCH, DELORES A.	F	W	9-18-23
PLAGER, MORTON	M	W	1-19-25
RAFKIN, MAX	M	W	7-11-96
SCHAEFER, MARJORIE	F	W	0-0-18
SEERTH, ADOLPH	M	W	10-12-95
SILVERMAN, JENINE	S	W	9-16-42
WATSON, CHARLES R.	M	W	6-18-25
WATKINS, ELLIOT	M	W	7-27-03
VON ZAST, SANDRA	F	W	9-10-48

MASIN, JOAN - Unable to identify due to insufficient information.

SIMON, SAMUEL -Unable to identify due to insufficient information.

ONE LATIN SURNAME
NO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
GILL, DANIEL K.	M	W	4-17-23
SMITH, JANE SEVIER	F	W	8-21-38
JACKSON, HAROLD M.	M	W	6-21-16
DeMARCO, ALEXANDER J.	M	W	6-3-19
SIMON, MARILYN	F	W	0-0-33
ALBERT, LESTER	M	B	11-21-20
BERNE, GEORGE R.	M	W	3-22-99
BOLGER, JAMES L.	M	W	7-21-03
BOOZ, ELIZABETH G.	F	W	7-8-11
COLLINS, STEPHAN C.	M	W	0-0-14
EFTHIMIOU, LOLA	F	W	7-6-29
FOGARTY, RAYMOND F.	M	W	11-25-22
HARLOW, JOHN R.	M	W	8-11-24
HARRISON, EDWARD R.	M	W	4-3-35
HOBBES, CHARLES S., JR.	M	W	1-8-20
HOEHN, SCOTT J.	M	W	3-27-23
IDAN, JERRY	M	W	1-3-32
JONES, EVA P.	F	W	0-0-15
KANTER, NANCY	F	W	6-29-23
MILLER, DEAN R.	M	W	0-0-19
PRINCE, ELBERT R., JR.	M	W	6-25-20
SCHWARZBART, GUNTER	M	W	3-3-32
SUBERS, JEAN DORIS	F	W	3-10-16

NO LATIN SURNAMES
ONE BLACK

NAME	SEX	RACE	DATE OF BIRTH
KRONISH, LEON	M	W	3-21-17
MOONEY, OTTIS A.	M	W	11-21-24
LANGER, SIDNEY W.	M	W	0-0-09
GAYNOR, MILTON M.	M	W	7-6-17
BOLEN, SUNYON D.	M	W	2-16-23
CANNON, RUTH C.	F	B	9-3-28
CLASBY, NANCY	F	W	9-21-18
COLEMAN, DAVID C., JR.	M	W	11-30-17
CORNELIUS, EUGENE C.	M	W	0-0-12
HALPERN, FAYE R.	F	W	1-4-21
HAUSMANN, DONALD J.	M	W	0-0-04
HENRY, C. W.	M	B	11-05-01
JONES, CLARKE	M	W	0-04-09
KELLER, JUNE	F	W	0-0-04
LABATON, ANN	F	W	6-05-25
MAMLIN, BETTY JEAN	F	W	0-6-05
MANDEL, SOL C.	M	W	4-03-09
MEYER, MARGARET	F	W	5-10-02
MILLER, SHIRLEY W.	F	W	12-16-17
MOCO, RALPH H.	M	W	10-16-12
SINGER, ALBERT H.	M	W	11-30-02
MARSHAM, BERT	M	W	6-0-05
YOUNG, FREDERICK R.	M	W	0-0-08

NO LATIN SURNAMES
TWO BLACKS

NAME	SEX	RACE	DATE OF BIRTH
PHILPITT, MARSHALL	M	W	0-0-22
CAESAR, JACK R.	M	W	12-6-19
STURM, ANNE	F	W	0-0-16
CROW, PATRICIA L.	F	W	0-0-27
ARGO, JAMES THOMAS	M	W	2-13-15
BARNES, A. DOUGLAS	M	W	4-22-03
BUDDE, EVELYN J.	F	W	7-6-36
CONDERMANN, SUE	F	W	7-27-38
CORBETT, GEORGE R.	M	W	10-12-47
CORDRAY, ANN	F	W	11-28-02
CORNELIUS, GEORGE R.	M	W	10-14-19
CORSETT, WINFRED	M	B	11-9-21
EPSTEIN, JOY R.	F	W	9-23-25
HESSEN, VIRGINIA	F	W	10-4-25
HOYT, CLYDE R.	M	W	7-28-20
LEVITT, RONALD	M	W	9-23-21
MC GAHEY, KENT C.	M	W	8-19-42
NEAL, MARY E.	F	W	6-1-08
PALLOT, ROSALIND W.	F	W	3-14-34
QUENTIN, RUTH	F	W	1-14-19
SAMUELS, ERNEST	M	W	7-9-06
SIPKIN, GEORGE	M	W	7-2-14

ROLANSKY, RANDY - Unable to identify due to insufficient information.

ONE LATIN SURNAME
ONE BLACK

GRAND JURY - SPRING TERM 1977

NAME	SEX	RACE	DATE OF BIRTH
BUCHANAN, FRANK M.	M	W	8-21-19
DEETS, OLIVIA S.	F	W	2-21-50
ANDREWS, JOYCE E.	F	W	7-10-33
CALHOUN, MIKE	M	W	8-13-27
BRYAN, RICHARD MARVIN	M	-	0-0-22
COGDELL, WALTER C.	M	B	7-28-39
CORNELIUS, HELEN A.	F	W	8-6-20
FEICK, DANIEL B.	M	W	9-14-34
FINCHER, DAVID	M	B	2-16-34
FRITZ, DAWN E.	F	W	9-29-55
GITTLEMAN, JOSEPH	M	W	9-6-21
HENRY, MARGARET M.	F	B	6-23-34
JASPER, HARRY W.	M	W	10-16-06
JOHNSON, LILLIAN M.	F	W	1-18-04
KANNER, MARCIA J.	F	W	9-24-35
KOCH, JACK D.	M	W	6-12-12
LEHFELDT, JANE	F	W	7-14-15
LONGO, C. JOHN	M	W	8-11-24
MAHAY, J.MICHAEL	M	W	3-22-37
SMITH, THOMAS	M	W	0-0-26
STOKES, WALTER J.	M	W	3-15-10
WALLER, W. L., JR. (LEE)	M	W	10-7-34
WORONER, MURRY	M	W	8-21-28

NO LATIN SURNAMED
THREE BLACKS

EXHIBIT "E"

DEMOGRAPHIC CHARACTERISTICS OF CENSUS TRACTS OF CIRCUIT COURT JUDGES BASED ON 1970 CENSUS

DADE COUNTY CIRCUIT JUDGES	CENSUS TRACT	PERCENTAGE OF BLACKS	PERCENTAGE OF LATINS	MEDIAN INCOME	PERCENTAGE OF FAMILIES BELOW POVERTY LEVEL
JOHN R. BLANTON 9220 SW 59 St.	85.02	0.3	17.0	$14,374	0.7
DIXIE H. CHASTAIN 4330 Bay Point Dr.	21	0.6	10.8	$ 9,982	4.0
FRANCIS J. CHRISTIE 1104 Andora Ave.	79.01	0.3	21.0	$ 7,375	-
EDWARD D. COWART 8340 SW 142 St.	82.01	-	4.0	$18,549	2.6
GRADY L. CRAWFORD 7911 SW 58 St.	77.02	0.1	18.0	$10,945	3.9
IRA L. DUBITSKY 7753 SW 102 Pl.	84.01	0.2	12.0	$11,256	5.1
HARVIE S. DUVAL 9876 NE 12 Ave.	12.02	0.2	6.7	$10,324	6.4
JAMES J. EARNEST 1897 SW 16 Terr.	64	0.2	70.0	$ 5,805	15.1
BOYCE F. ESELL, JR. 2025 S. Alhambra Circle	61.01	-	26.0	$ 9,692	11.4
HAROLD G. FEATHERSTONE 1232 SW 17th St.	79.01	0.3	21.0	$ 7,375	-
JOHN V. FERGUSON 7890 SW 152 St.	82.01	-	4.0	$18,549	2.6
RALPH B. FERGUSON,JR. 365 NW 14 Ct.	51	1.1	60.0	$ 3,115	13.3
RICHARD S. FULLER 9360 SW 140 St.	83.01	90.7	0.4	$ 8,449	11.0
JOHN GALE 6285 Old Cutler Rd.	73	1.5	7.7	$11,777	6.2
SEYMOUR GELBER 3443 N. Meridian Ave.	41.01	0.4	11.0	$ 4,285	10.6
WILLIAM E. GLADSTONE 8995 SW 84 Ct.	78.03	0.3	7.0	$13,046	3.1
DAVID GOODHART 11231 SW 69 Ct.	78.02	0.1	5.0	$15,634	4.2
PHEA PINCUS GROSSMAN 1940 Bay Dr.	39.02	0.3	5.0	$ 7,478	9.2
WILLIAM A. HERIN 470 NE 81 St.	21	0.6	10.8	$ 9,982	4.0
JAMES W. KEHOE 8900 SW 104 St.	78.02	0.1	5.0	$15,634	4.2

EDWARD S. KLEIN 1900 SW 59 Ave.	59.04	0.1	36.0	$ 8,319	8.7
FRANCIS X. KNUCK 60 Olive Dr.	16.02	-	38.0	$ 8,109	10.1
JOHN RED LAKE 5330 SW 7 St.	58.01	0.1	58.0	$ 7,464	10.3
THOMAS E. LEE 2490 W. Bisc. Canal Dr.	11.01	0.1	18.0	$ 7,895	5.2
ELLEN J. MORPHONIOUS 8640 SW 84th Ave.	77.03	0.1	6.0	$ 9,602	4.7
GEORGE ORR 8235 SW 99 St.	78.03	0.2	7.0	$13,046	3.1
J. GWINN PARKER 1341 Castile Ave.	61.02	0.3	17.0	$11,287	4.3
DAVID POPPER 8900 SW 85 St.	76.04	0.3	9.2	$ 4,211	7.6
DANIEL SATIN 11930 N. Bayshore Dr.	1.03	-	-	$ 5,417	7.8
ARDEN M. SIEGENDORF 2351 S. Bayshore Dr.	71	56.2	4.0	$ 5,377	13.7
SAMUEL I. SILVER 90 Edgewater Dr.	73	1.5	7.7	$11,777	6.2
DONALD E. STONE 4935 Riviera Dr.	75	1.9	8.7	$ 983	4.6
HAROLD R. VANN 150 Ocean Dr.	46	Demographic area too small to be calculated			
SIDNEY M. WEAVER 9050 SW 84 Ct.	78.03	0.2	7.0	$13,046	3.1
GENE WILLIAMS 811 NW 195 Terr.	99.02	-	8.6	$11,823	4.4

EXHIBIT "F"

MEMORANDUM

CTS Executive Committee — DATE: December 1, 1976

SUBJECT: December Forum Agenda

FROM: Rev. Edwin Gilligan, Jr.

DECEMBER FORUM ANNOUNCEMENT

TIME: 9:30 a.m. - 12:00 noon
DATE: Friday, December 10, 1976
PLACE: County Commission Chambers
County Courthouse
73 West Flagler St.

AGENDA

1. Burning Issues

2. Does Opa-Locka have new solutions in code enforcement regarding bad housing?

3. Is the Grand Jury composition an unfair representation of the community?

2. Does Opa-Locka have new solutions in code enforcement regarding bad housing?

BACKGROUND

In March 1950, the League of Women Voters of Miami, finding that slum areas breed crime, disease and conservice socially and financially drain the total community, called for a comprehensive plan of slum clearance and the improvement of housing by government and private enterprise. Twenty years later, the "Profile of Metropolitan Dade County: Conditions and Needs," published by the Community Improvement Program, showed that the

of the housing stock in minority neighborhoods are deficient or, there are, at least, 23,000 deficient units overall in Dade County. The report further states that only one percent of these 23,000 deficient units are so dilapidated as to require demolition and clearance. Investigation stories in the Miami News, the Miami Herald, and a Model City "Germ City Report" show that most of these units are multiple-family units owned by absentee landlords. Twenty-five years later, the Comprehensive Master Plan for Dade County proposed that these units be required to be brought up to standard. The Minimum Housing Standards Division of the Dade County Department of Housing and Urban Development is charged with the function of enforcing these standards of making housing "fit for human habitation." The question, thus, after twenty-five years, is what are the impediments that prevent the result of improved housing under the present Minimum Housing Standards Ordinance? Is it a question that the Ordinance is too weak to punish owners who violate the Ordinance, or should Dade County itself be authorized, as in the City of Opa-Locka, to rehabilitate the housing? Who should be charged the cost, the owner? the tenants? the public? Is it economically unfeasible for the owners to comply with strict enforcement orders? Would strict enforcement displace 23,000 tenants as was reported to have been said by the Minimum Housing Office, when there is no private housing market for these tenants and when there is already a 20,000 waiting list for public housing? Should Dade County take over the housing owners choose to abandon to keep from complying with strict enforcement orders and convert such housing to public housing? Or, should such owners be provided "positive reinforcement" to rehabilitate their property through tax relief proposals or low interest loans? Should absentee owner landlords benefit from such tax relief and low interest loan programs? Should there be a form of rent control as a condition to such grants?

Symposium on Landlord/Tenant

The CRB Forum Division proposes to present the ordinance passed by the City of Opa-Locka last October for the discussion of whether or not this ordinance should be adopted by Dade County on a county-wide basis where it provides: (1) that a landlord may be found in violation of such housing standards on a prima facie basis (this may place the burden of proof on the landlord to show that he is in compliance); (2) that its local housing authority may make repairs or demolish such housing, if uninhabitable, if landlords fail to comply with emergency enforcement orders; and (3) that its local housing authority may receive and administer security deposits already made by tenants to be applied towards such repairs. Accordingly, the Forum Division is inviting Mrs. Eufala Frazier, the Director of T.E.A.M., an organization that represents and supports low income tenants, to clarify whether deficient housing continues to be a present problem throughout Dade County. The Forum Division is also inviting Mayor Candido Olardino and City Attorney Albert L. Weinberg, of the City of Opa-Locka, to clarify the misunderstanding of their ordinance. The Forum Division is also inviting Mr. Eugene F. Miles, from the Dade County Minimum Housing Standards Office, to clarify the effectiveness and problems of obtaining compliance by landlords with the Dade County Minimum Housing Standards Ordinance, and the feasibility of Dade County adopting the City of Opa-Locka Ordinance on a county-wide basis.

(2) Is the Grand Jury composition an unfair representation of the community?

Background

The Community Relations Board has received as a burning issue, at its September Forum, the claim that there is no Black, Latin, or poor representation on the Grand Jury.

Further investigation and research has shown that it appears that the selection process in obtaining Grand Jury persons does not cause the Grand Jury to necessarily reflect the identifiable groups of the community, particularly the Blacks, Latins, the poor, and the young. Further, the City of Miami, in November, adopted a resolution.... "urging the Grand Jury Commission of Metropolitan Dade County to exercise scrutiny in their preparation of the list of jurors to serve as grand jurors and thereby demonstrate that the part of the judicial system referred to as the Grand Jury and the guardian of the police power of the state is a system and means whereby all of the people of Dade County can participate directly in the administration of their government." The concern of whether the Grand Jury composition is an accurate representation of the community is not limited to the need for the function of the Grand Jury to investigate crimes but also extends to the need for the watchdog function of the Grand Jury to investigate and make recommendations regarding operations of government. The questions, thus, are: Should Dade County grand jurors reflect necessarily the identifiable groups of Dade County, or, would the implementation of such a requirement be a form of reverse discrimination? Should there be another selection process done on a random basis in addition to a list from voters' registration list, or would such a duplication be counter-effective in obtaining qualified "blue ribbon" grand jurors who can handle complex questions?

SUMMARY OF COMMENTS

The CRB Forum Division proposes to bring to the community this issue with the objective to discuss what ways could be obtained to assist the Grand Jury commissioners, presently composed of the forty-one Circuit Court judges, to prepare a list of jurors that would be fairly representative of the total community, to discuss whether or not the present composition of the Grand Jury and the

way it is selected is in fact fairly representative of the total true interest and needs of justice of all the people in Dade County, and, to discuss whether it is feasible to adopt alternative selection processes. Accordingly, the Forum Division, for assistance in meeting those objectives, is inviting Attorney Jay Eisenhower, the attorney representing clients attacking the Grand Jury selection process, and, Representative Allan Becker, who sponsored in the past legislative session a bill that the voters' registration list be the basis for selecting grand jurors, as speakers.

MEMORANDUM

Dade County Community Relations Board Council

DATE January 4, 1977

SUBJECT January Forum Agenda and Brief

Rev. Edwin Gilligan, Jr.
Chairman, Forum Division
Community Relations Board

Contact: Mr. John Doe - 579-6730

The Dade County Community Relations Board shall hold a Forum on Friday, January 14, 1977, from 9:30 a.m. to 12:00 noon, at the County Commission Chambers, County Courthouse, 73 West Flagler Street. The Agenda shall be as follows:

1. Burning Issues (unscheduled community concerns)

2. The Selection Process for the Grand Jury: Part II

3. What are the Problems and Human Needs Behind a School Policy of Excessive Discipline: Suspensions, and Expulsions?

4. The Grievance Process for the Grand Jury: Part II

For this subject, the speakers shall be the Presiding Judge of the Dade County Grand Jury, Hon. Harold Klein, and the President of the Grand Jury Association of Florida, Inc., Mr. Ben H. Goldman.

A. Background

This subject is a continuation of the December Forum. The CRB Board Council received a Forum Report at its December meeting proposing findings and recommendations. The CRB Board Council did not determine the question regarding the selection process for the Grand Jury. The question before the CRB Board Council was whether the selection process was conducive, as an end, to a Grand Jury panel composed of Dade County citizens who are representative of the interests of all Dade citizens and are representative of the community at large.

the people of the community, specifically, in relation to the functioning of government function. The Forum Report stated that the perception is that the selection process tends to produce white, middle and upper class grand juries who tend to review problems that reflect the families needs and interests of members of their class, but tend not to review the needs and interests of members outside of their class that they are not familiar with. Thus, it was determined by the Old Board counsel to seek to hear the concerns of the Presiding Judge of the Dade County Grand Jury, and the proposal of the Grand Jury Association of Florida, Inc., at the January Forum, regarding the selection process.

3. Statement of Objectives

One objective of the Forum shall be to seek from the Presiding Judge of the Grand Jury the interest he may have regarding whether there is a need of assistance in reforming the selection process, or whether there is a need to change the system. Further, it shall be an objective of the Forum to review the initial proposal by the Grand Jury Association of Florida, and to compare it with the proposal by Representative Alan Becker that was presented at the December Forum.

(1) The present system: Under the present system, each of the State Circuit Court Judges, sitting as Grand Jury Commissioners, nominate ten persons to form a prospective Grand Jury pool of five-hundred names. Then the judges, sitting as Grand Jury Commissioners, after screening, choose a venire of ninety persons from this pool (group of persons to be called to serve on the Grand Jury). On the date that they are summoned, the 90 names are put in a disk-bowl and the Presiding Judge will draw twenty-three names for the Grand Jury panel.

(2) Proposal by Representative Alan Becker: Under the proposal introduced last year in the Florida Legislature by Representative Alan Becker, the function of

the Florida Senate Judges sitting as Grand Jury commissioners would be eliminated. In his proposal, the initial pool of grand jurors, the venire, and the Grand Jury panel would result from a computer assisted random selection process originating from the Supreme Court registration list and would be administered by an administrative clerk. This selection process would be similar to the way in which federal grand juries are selected.

Pursuant to the Grand Jury Association of Florida, Inc., the initial pool of grand jurors would originate from the Supreme Court registration list by random selection. However, the remaining functions of the Circuit Court Judges as jury commissioners would be maintained. Under this proposal, the judges, as jury commissioners, would select randomly from the Grand Jury pool a tentative venire and discuss the qualifications of the persons, would inquire from any state and local government agency for relevant information, and review responses of questionnaires sent to persons on the tentative venire. Any Grand Jury commissioner, by a vote, may eliminate any name from the tentative venire list. (See Sections 14, 15, 16 and 18 for the specific grounds potential grand jurors would be "selected out" as set forth in the proposal by the Grand Jury Association of Florida included in the attachments to this Brief, namely, pages 16, 17, 18, 19 and 20 of their proposal).

II. What are the problems and issues raised because a complete picture of minority participation, independence, and representation?

The speaker for this subject shall be Dr. Leonard M. Britton, Interim Superintendent, Dade County Public Schools.

A. Background

At the January 6th Forum in 1972, concerns were raised about the reasons for and the consequences of the disproportionate

suspensions and expulsions of Black students. As a result, the school system initiated a new policy of keeping such children within the school system through a policy of in-house suspensions in order to avoid the consequences of children being out of school and being without any education. This new policy included the policy of in-house suspension to special "S.S.S. classes" within the same school, or reassignments to approximately schools. Consequently, since 1974, outdoor suspensions of school children have dropped from 14,000 to 4,400, and expulsions have dropped from 187 to zero, but cases of in-house suspensions and reassignments to approximately schools have increased to more than 25,000. Officials claim that this in-house suspension policy has had little impact on behaviour. In was the question of this behaviour that the end, in its special Report "Corporal Punishment in the Schools, November 1976," made recommendations that included the need for coordination of agencies in dealing with discipline and the welfare of the child, and the need of integration of the functions of the State and, particularly, the division of Youth Services, with the School Board.

3. Statement of Objectives

a. The first objective of this Forum is to invite Dr. Bolton to explain why the school system is 'reaching down' in discipline and why this will mean building up suspensions and expulsions. It is hoped that this objective will clarify the concern that his proposed policy is a retreat from the 1973 affirmative effort to keep children in school who otherwise would be out of school. Further, it is hoped that this objective will clarify the concern that his proposed new policy will mean a return to disproportionate suspensions and expulsions of Black students.

b. The second objective is to invite Dr. Bolton to discuss the meaning of his new policy in relation to other institutions of society, particularly, those other agencies that serve the welfare of children. It is

hoped that this objective will clarify the need for joint policy making, planning, implementation and evaluation regarding the following questions:

1.1 The need for preventive care of children who are not to be served within the school system.

1.2 The human need where the school system does not, or is not able to, treat perceived maladaptive, its causes, and its consequences.

1.3 The need for institutions to correct or discipline those environmental influences that maintain maladaptive behavior and maladjustment.

1.4 The need to review the standards for using disciplines, suspension, and expulsion policies and the administration of these policies from a civil rights and community relations perspective.

EXHIBIT "H"

COMMUNITY RELATIONS BOARD, INC.

A SPECIAL REPOR

No. 77-77-3

THE SELECTION PROCESS FOR THE GRAND JURY: ITS DIAGNOSIS AND TREATMENT

MARCH 1977

METROPOLITAN DADE
FLORIDA

THE SELECTION PROCESS FOR THE GRAND JURY: ITS DIAGNOSIS AND TREATMENT

SPECIAL REPORT

METROPOLITAN DADE COUNTY, FLORIDA
COMMUNITY RELATIONS BOARD

THE SELECTION PROCESS FOR THE GRAND JURY: ITS DIAGNOSIS AND TREATMENT

Submitted by:

RICHARD A. PETTIGREW
Chairman
Community Relations Board

ROBERT E. SIMMS
Executive Director
Community Relations Board

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Introduction

"Methods of racial exclusion in the South (representation on juries) however are becoming more subtle, while throughout the rest of the nation official requirements and economic factors reduce the number of Blacks on juries. . . . In this case the grand juries, which are generally chosen from persons nominated by public officials, civic organizations or 'prominent' citizens the likelihood of representative Black participation is even smaller."

Institutional Racism in America
By Louis L. Knowles and Kenneth Prewitt

"Among the more sophisticated methods (systematic exclusion of Blacks from juries) are those of summoning Blacks for jury service without placing them on the panels, and agreements between counsel, sometimes even with the open support of the judge, to remove any Blacks on the panel by use of preemptory challenges."

U. S. Commission on Civil Rights, Report on Justice, 1961 page 100

"A typical example of grand jury selection is the situation in Baltimore, where grand juries are chosen by the judges of the supreme bench who meet three times a year to discuss the qualifications of prospective jurors. To obtain qualified Negro jurors, the judges have asked prominent colored persons to submit the names of likely members of their race...this is tokenism at best."

U. S. Commission on Civil Rights, Report on Justice, 1961 page 94

"The jury system, like judicial agencies and the legal profession, either through conscious prejudice or through the unintended consequences of applying apparently non-racial standards excludes Black people."

Institutional Racism in America
By Louis Knowles and Kenneth Prewitt

INTRODUCTION

"Some of our courts, moreover, have lost the confidence of the poor . . . . We have found that the apparatus in some areas has itself become a focus for distrust and hostility . . . . Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders . . . ."

Report of the National Advisory Commission on Civil Disorders

" . . . In recent years, the Grand Jury as an institution has come under criticism. The Grand Jury was abolished in England in 1933 and has also been abolished in many states in this country . . . . However, it remains part of the federal system and many state systems because of constitutional provisions which cannot be easily changed. As lawyers charged by our Code of Professional Responsibility with assisting in the improvement of the legal system, we must work to resolve existing problems of the grand jury and its operation."

ABA Criminal Justice Section to Seek Grand Jury Reform, Richard Gerstein, Section Chairman, 1977

" . . . If oppression and conflict are to give away to harmony and content, the way must be found to recognize cultural differences within a framework of political and economic unity . . . . There is enough accumulated experience throughout the world to make it clear that heterogeneous populations do not have to be faced with the problems of the prejudice and intergroup discrimination."

Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination, Simpson and Yinger

SPECIAL REPORT

THE SELECTION PROCESS FOR THE GRAND JURY

I. DIAGNOSIS

A. Symptoms

The Dade County Community Relations Board, at its September 1976 Forum, received during its "Burning Issues" portion the complaint from a Latin community leader, later supported by similar complaints, that Latins are not being called to serve on the Dade County grand juries as they ought to be. The concern is that Latin community dissatisfaction and alienation exist because of perceived systematic exclusion from participating in the criminal justice system to meet their needs, as evidenced that only one of ten persons with Spanish-speaking surnames have been chosen on the grand juries these past few years. Because they constitute 35% of the total community, it is perceived by them that this disparity is in conflict with professed democratic principles of equal justice. A similar concern has been raised by others that the grand juries have not been relating to the interests and needs of the Black community and the poor community because the composition of recent grand juries appears to represent only the White male middle class people only.

The Dade County Community Relations Board does find that an unhealthy condition affecting community relations exists in this general community regarding the criminal justice system, relating to its grand jury system. (See Exhibit "C", page 12.) This unhealthy condition is the sense of alienation and exclusion believed and felt by leaders of the Latin, Black, and poor community in the direct participation and administration of their government.

B. FINDINGS REGARDING THE SOURCE OF THE CONCERN

It is the diagnosis by the Dade County Community Relations Board that the source of this concern is the active perception held by representatives of the Latin, Black, and poor communities that the selection process for the Dade County Grand Jury System is not reasonably in the providing of a fair opportunity for all citizens to be represented on the Dade County grand juries regarding their interests and needs, because of systematic exclusion that results from their race, sex, ethnic origin, economic or social condition. (See Exhibit "C", pages 18 and 19).

Because of this diagnosis regarding the source of the concern, the selection process for the grand jury, the Dade County Community Relations Board hereby reviews proposed treatment plans that include the following alternatives: (a) keeping the selection process as it is; (b) changing the selection process; (c) findings and analysis of needs; and, (d) recommendations.

II. PROPOSED TREATMENT PLANS

A. KEEPING THE SELECTION SYSTEM AS IT IS

1. Advising the Affected Communities

It is the opinion of the State Attorney and of the Clerk of the Circuit Court, Dade County, that there is no reason for not keeping the selection process as it is. (See December Forum Minutes, Exhibit "B", pages 15 and 16, and, December Forum Report, Exhibit "C", page 17.

Therefore, an alternative treatment plan would be to leave the selection process as it is, and, in order to respond to the findings regarding the sense of alienation that exists in affected communities and the source of concern, the proposed choice would be to educate the affected communities that quality

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grand juries representing the interests of all the people have been produced and are being produced by the selection process. In response to the argument of little or no participation of the representatives of the affected communities on the grand juries, the effect of race treatment plan is that it would be based upon the assumption that there is a duty of the communities that positive exclusion by the selection process is proof discrimination. Further, any exclusion or lack of Latins, Blacks, or the poor, would be assumed not to be due to intentional discrimination due to race, ethnic origin, sex, economic or social conditions, and no discrimination that is proven will be unconstitutional or would be wrong. (See Exhibit "E", page 19).

Findings

The Dade County Community Relations Board's perspective regarding the value of keeping the selection system to the grand jury as it is, is not based upon the assessment of whether there is proven discrimination due to race, etc., but whether the present selection process produces quality grand juries relative to representing all the people of Dade County. The Dade County Community Relations Board adopts the finding of the 1976 December Forum Report that the present selection process has not been achieving as a goal quality grand juries, namely, those grand juries who are representatives of the interests of all the people of the community, specifically, in relation to the interests of government function. (See December Forum Report, Exhibit "C", pages 17, 18 and 19.)

This finding does not imply that one needs to be of Latin extraction to be sensitive to Latin needs, or be Black to be sensitive to Black needs, or be poor to be sensitive to poor needs. Nor does the finding imply that the judges, as jury commissioners, and the members of the various grand juries, if they do happen

to be predominantly of the White male middle class, are not sensitive in fact to the needs of the Latin, Black, or the poor.

What this finding means is that no grand jury can be sensitive to the needs of the Latin, Black or the poor if they do not know about such needs. Thus, if the usual source of knowledge on any question before the grand jury is usually its advisor, the assistant state attorney, or from themselves, it is thus the finding that grand jury quality is diminished if the felt needs of the Latin, the Black and the poor are not represented on said grand juries by members of these groups by their direct participation on grand juries.

Because other systems of government value the need to relate to the felt needs of Latins, Blacks and the poor by the direct participation of members of these groups in order to promote the general welfare, such as the citizen advisory committees to the Dade County Office of Community Development and the agencies of the Dade County Department of Human Resources, so should the grand jury system.

2. Advising the Judges

Another treatment plan would be to leave the selection process as it is, but advising the judges. . .

> "... to exercise scrutiny . . . whereby all of the people can participate directly in the administration of the government."

The foregoing was the advice of the City of Miami by resolution adopted at its November 1976 meeting of the City Commission. (See December Forum Agenda and Brief, Exhibit "A", page 12.)

This Miami resolution means that the judges themselves would assume an affirmative duty to include members of the Latin, Black and poor communities in their selection

of prospective grand juror pools and grand jury venires, in order to assure that . . . "All of the people can participate directly in the administration of the government."

FINDINGS

2.1 It is found, upon review of statements of Hon. Judge Harold Vann at the January Forum, that the judges desire to be relieved from the function of selecting prospective grand jurors. (See Exhibit "E", page 28.)

2.2 The judges already have the duty, that in their function of selecting prospective grand jurors, not to exclude such persons or to discriminate against persons in nominating prospective grand jurors because of their being Latin, Black, or poor. But if it is a legal policy that the courts have not accepted the evidence of a disproportionate small number of Latin, Black, or the poor, being on the grand jury pool or venire, as raising a legal presumption of intentional discrimination, the perception is held within the Latin, Black and the poor community that there is such discrimination despite disclaimers by the judges. (This perception is part of the community alienation that exists.) (See pages 1 and 2 of this Report.)

2.3 It is not feasible for the judges to assume the affirmative duty to select persons who are Latin, Black, or poor for prospective grand jurors. Judges already have the primary responsibility of judging cases and controversies. However, the present selection system requires the judges to select those persons who they know because they have the duty to personally nominate those who are included. (See January Forum Division Report, Exhibit "E", pages 28 and 29.) It is not feasible to expect the judges individually and collectively, to actively situate themselves so as to able to know persons outside of their class, and like

experience, as White male middle class, to select Latins, Blacks, and the poor, as prospective grand jurors.

2.4 It is a legal question, under the principle that "justice is blind" as to whether it is proper for judges to specifically select persons as prospective grand jurors who are Latin, Black or poor, and it raises questions of reverse discrimination and preferential treatment that may be unnecessary if an alternative process of selection can be employed without the direct participation of the judges. (See December Forum Division Report, Exhibit "C", pages 17 thru 19.)

The December Forum Agenda and Brief raises the question..."Should Dade County grand jurors reflect necessarily (underline added) identifiable groups of Dade County?..." To assume such an affirmative duty to [illegible] select Latins, Blacks, or the poor as prospective grand jurors may be discriminatory against persons who are not [illegible] Black or poor, as a constitutional question, or may result in a consequential erosion of [illegible] alienation of such groups who perceive discrimination or who perceive an unfair distribution in any selection of prospective grand jurors.

3. [illegible] the Selection Process

1. In General

The December Forum and the January Forum, including preliminary and follow-up research and investigation by the CRB Forum Division, have reviewed four alternative ways of selection of prospective grand jurors that is different from the present system, as set forth below:

1.1 The Pre-1970 Selection Process

The pre-1970 grand jury selection process had been described as a system where the Governor, the Supervisor of Elections (which had been an elected position), the Clerk and the Chairman of the Board of County Commissioners would appoint jury commissioners. The Community Relations Board was informed that this system came under criticism because of politics and, as a result, the present system was instituted.

1.2 The Proposed Becker Amendment

The proposed Becker Amendment would authorize the elimination of the Circuit Court Judges' function in Grand Jury Commissioners and would allow the use of a computerized random selection process. Originators deem the county voters registration list and it would be administered by an administrative clerk. (See the January Forum Agenda and Brief, Exhibit "D", pages 20 and 21.) The Community Relations Board heard the concern, however, that this proposal does not provide a sufficient system to obtain representative grand juries so as to exclude those who are not qualified. Representative Alan Becker, the sponsor of the proposed amendment, recently raised the question as to whether a computerized system re-institutes systematized discrimination against Latins, Blacks, and the poor, which a random selection process is designed to correct.

1.3 The Complete Revision of Chapter 905 Proposal by the Grand Jury Association of the State of Florida

The proposed complete revision proposal regarding the changes of the selection process is more fully described in the January Forum Agenda and Brief, Exhibit "D", pages 20, 21 thru 27, and the January Forum Report, Exhibit "E", pages 28, 29

and 20. The initiatory selection process is similar to the proposed Becker treatment, but includes the feature of the judges continuing the function of being jury commissioners in the screening, and excluding prospective grand jurors who, in their discretion, they believe are not qualified either by prescribed tests or pursuant to certain grounds. (See January Forum Agenda and Brief, Exhibit "D", pages 16, 19). In addition to the Becker criticism, Mr. Eormby raises the question that the proposal is too complicated, that reasons or grounds for exclusion are too subjective. (See January Forum Report, Exhibit "E", page 29, and Summary of Review of Grand Jury Association Proposal, Exhibit "F", pages 13 thru 16.)

The Federal Grand Jury Selection Process

The Federal Grand Jury selection process is described in the January Forum Report, Exhibit "E", pages 24, 26 thru 27. It is claimed, as reported in the January Forum Report, that the Federal Grand Jury selection process is also initiated on a random selection basis, similar to the Becker proposal. However, it has a screening process which is claimed to be more simple and objective in order subjective disqualification criteria by requesting a prospective grand juror to answer a questionnaire. Therefore it can be administered by an administrative clerk. Further, grand jurors are provided a per diem of $20.00.

The criticism has been raised that the Federal Grand Jury selection process should not be adopted as a local process because the Dade County Grand Jury has a function that is not carried by the Federal Grand Jury. This function is the "watchdog of government" function, a function inquiring into complicated operations

of government which necessitates a higher qualified grand juror than that needed by a federal grand jury.

Findings and Analysis of Needs

1. The Dade County Community Relations Board takes notice that this community of 1,500,000 persons is a [illegible] heterogeneous community, a bilingual, a bi-racial, and multi-ethnic community with more special needs to be served by its government that are unique to these characteristics, more than any other community in the State of Florida other than Dade, Florida.

2. The Dade County Community Relations Board further finds that the historic function of the grand jury system is, to protect the powerless from the arbitrary abuses of the "king" (the government), and as long as the grand jury is perceived to be a prerogative of the white middle class as a dominant group, it will be perceived that this historic function is not being served on behalf of the Latins, Blacks, and the poor, who, as minority groups, not in terms of numbers but in terms of power, are at a disadvantage.

3. The Dade County Community Relations Board further finds that if the functions of the grand jury system include broad investigatory and recommendatory functions, these functions are not being implemented to the full needs of the Latin, the Black, and the poor, are not being representatively met in relation to paragraphs 1 and 2 above.

4. The Dade County Community Relations Board further finds that the grand jury system represents one of the key institutions of government where citizens have the opportunity to participate. Therefore, a selection process which is perceived to be discriminatory by an affected group has an effect of

destroying confidence and support from the group against whom discrimination seems aimed.

5. The Dade County Community Relations Board concludes that the unhealthy condition of community alienation and sense of exclusion that exists cannot be treated by retaining the present selection process as the grand jury because by design it cannot result in quality grand juries but include the values that are set forth in these findings and analysis of needs.

D. RECOMMENDATIONS

1. The Dade County Community Relations Board recommends that the present selection process be changed by elimination of the function of the judges to select prospective grand jurors, and further recommends that a random selection system be instituted so that divergent viewpoints held by the various social classes of this community may be represented, including the Latin, the Black, and the poor.

2. Of the proposed selection processes, the Community Relations Board looks with favor upon such reform of the present selection system that would include provisions which are similar in spirit to those provisions under the federal system for selecting grand juries, such as increasing the present per diem in the Dade system from $10.00 to $20.00 to enable the poor to serve.

3. The Dade County Community Relations Board further favors the federal system because it believes that a random selection process will be acceptable only if there is a screening process of the unqualified on an objective non-discriminatory basis, and it appears the federal grand jury screening process is more inclusive of the Latin, the Black, and the poor, both by design and by result.

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In making this general recommendation, such provisions that we value from the federal system are policies such as:

3.1 Its policy that all citizens shall have the opportunity to be considered for service on federal grand juries.

3.2 Its policy that no citizen shall be excluded from service as a grand juror on account of race, color, religion, sex, national origin, or economic status.

3.3 Its policy for random selection which allows for any operating selection system to be reviewed and modified in order to be consistent with the above provisions and policies.

3.4 Its policy, regarding qualifications for grand jury, whereby any person is deemed qualified to serve.

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MEMORANDUM

EXHIBIT "A"

TO: CRB Executive Committee

DATE: December 1, 1976

SUBJECT: December Forum Agenda And Brief

FROM: Rev. Irvin Elligan, Jr.
Forum Chairperson

Is the Grand Jury composition an unfair representation of the community?

BACKGROUND

The Community Relations Board has received as a Burning Issue, at its September Forum, the claim that there is no Black, Latin, or poor representation on the Grand Jury.

Investigation: Investigation and research has shown that it appears that the selection process in obtaining Grand Jury members does not cause the Grand Jury to necessarily reflect the identifiable groups of the community, particularly Blacks, Latins, the poor and the young.

City of Miami: The City of Miami, in November, adopted a resolution..."urging the Grand Jury Commission of Metropolitan Dade County to exercise scrutiny in their preparation of the list of jurors to serve as grand jurors and thereby demonstrate that the part of the judicial system referred to as the Grand Jury and the guardian of the police power of the state is a system and means whereby all of the people of Dade County can participate directly in the administration of their government."

The Need: The concern of whether the Grand Jury composition is an unfair representation of the community is not limited to the need for the function of the Grand Jury to investigate crimes but also extends to the need for the watchdog function of the Grand Jury to investigate and make recommendations regarding operations of government.

The Questions: The questions, thus, are: Should Dade County grand jurors reflect necessarily the identifiable groups of Dade County, or, would the implementation of such a require-

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sent be a form of reverse discrimination? Should there be another selection process done on a random basis such as compiling a list from voters registration list, or would such a provision be counter-effective in obtaining qualified "blue ribbon" grand jurors who can handle complex questions?

STATEMENT OF OBJECTIVES

Scope: The CRB Forum Division proposes at the December Forum to bring to the community this issue with the objective to discuss what ways could be obtained to assist the Grand Jury commissioners, presently comprised of the fifty-one circuit court judges, to prepare a list of jurors that would be fairly representative of the total community, to discuss whether or not the present composition of the Grand Jury and the way it is selected is in fact fairly representative of the total true interests and needs of justice of all the people in Dade County, and, to discuss whether it is feasible to adopt alternative selection processes.

Invitees: Accordingly, the Forum Division, for assistance in meeting these objectives, is inviting Attorney Joel Hirschhorn, the attorney representing clients attacking the Grand Jury selection process, and, Representative Alan Becker, who sponsored in the past legislative session, a bill that the voters registration list be the basis for selecting grand jurors, as speakers.

MEMORANDUM

Exhibit "B"

TO: Rev. Irvin Elligan, Jr.

DATE: December 10, 1976

SUBJECT: December Forum Minutes

FROM: Mr. John D. Due,
Program Officer, and
Mr. Doran Cooper
Administrative Officer

CRIMINAL JUSTICE: IS THE GRAND JURY COMPOSITION AN UNFAIR REPRESENTATION OF THE COMMUNITY?

Attorney Joel Hirschhorn: The Grand Jury system in Florida is statutory with the Dade County Grand Jury selection process based upon a special statute. Here, a master list of 500 names is developed by Dade Circuit judges who each submit ten names to compile a list for "blue ribbon" Grand Jury. U.S. District Court Judge Dyer has ruled that no identifiable group shall be discriminated against. This includes identifiable groups here in Dade County such as Blacks, the Latins, and the poor. But Judge Dyer also says that jury discrimination is not easy to prove. Mr. Hirschhorn says that the method by which Grand Jury is selected is what the issue is, not the result. The evil is with the pools of names provided by the master list. The solution here is with proper legislation and not with the courts. Usually the most prominent names appear on the Grand Jury, the prevalent logic being that what is needed is "intelligent, educated people." If the investigation to obtain facts for a Grand Jury is a quality investigation by staff, then the average person can come to reasonable conclusions and serve as well as any Grand Jury member. For example, the Watergate Grand Jury that involved the President of the United States, President Nixon, was achieved by Grand Jury members, composed of ordinary average persons. Thus, the problem is with the process of selection.

Auditor--Mr. Richard P. Brinker: For clarification, the Grand Jury members are required to be registered voters and citizens of these United States. From his observation, there is in general, a representative sampling of minority groups on the Florida Grand Jury. The sum total of the list

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comes from the judges. Under a new statute that has been passed, the chief judge may select from a computerized program which has been declared valid and represents a cross section of the community according to sex, race, etc.

Representative Alan Becker: The recent Miami Herald stories state that Circuit Court judges seek to ensure the so-called 'blue ribbon' Grand Jury. Usually, only names of friends, of acquaintances, former campaign workers of the judges, comprise the list of ten names from each judge. He further believes that there is economic discrimination more than anything else against the poor. Consequently, this is why he introduced last year a selection process based upon neutral selection from the voters' registration list, which did pass the House of Representatives of the Florida Legislature and which he has again re-filed last week, this same bill.

Auditor-State Attorney Richard Gerstein: He feels random selection process of the Grand Jury members based upon the voters' registration list would be a mistake. But he would be able to live with it. He says that many grand jurors are not necessarily Circuit Court judges friends. Many do not know who recommended them. He says that the previous system, a voluntary grand jury system, was changed in 1967. Our present system began in 1970 and with this system, the jurors are usually more community involved, intelligent, etc. The pay of $10.00 a day to serve as a juror is too small an amount for poor people who would have to serve for several days as jury members. Before there is a change, more compensation should be available for those jurors who are poor and otherwise cannot afford to participate. In the past Grand Juries there have been minority members serving, including Spanish-speaking members. If a random selective process system is adopted, the quality of jurors will decrease.

Question by Mrs. Frances Thomas: Retire withdrawal grand jurors.

December Forum Minutes
December 10, 1976

Reply by State Attorney Gerstein: A high-quality grand juror will that person with the high sense of dedication to administration of the law, belief in justice, high degree of integrity, etc. Occupation, race, and income would not be the issue.

Response by Mrs. Frances Thomas: This may be your definition, but may not be the definition required of the judges.

Attorney Klugherz's response: No one has ever seen the master pool list of 800 names. He has conducted surveys here in Dade County and it looks like "who is who in Dade County."

Response by State Attorney Richard Gerstein: One should invite Mr. Ben C. Criswell, President of the Dade County Grand Jury Association, and should have invited Judges Vann and Crawford to relate to this issue.

Moderator's Summation: The Forum Division shall invite Mr. Ben Criswell, at his request, for the next Forum and for said occasion shall also invite Judges Vann and Crawford.

Adjournment.

MEMORANDUM

Exhibit "C"

TO: CRB Board Council

DATE: December 16, 1976

SUBJECT: December Forum Division Report

FROM: Rev. Irvin Elligan, Jr.
Forum Chairperson

Is the Grand Jury composition an unfair representation of the community?

A. The issue presented

1. Determination of charge to the speakers: Given that the present selection process does not necessarily result in a Grand Jury composition that is comprised of Blacks, Latins, and the poor, what is the wrong?

2. The argument affirming there is a wrong: What is the wrong is the selection process. The judges choose their friends or members of their class for their Grand Jury pool, thereby producing White, middle, and upper class grand jurors, who are unlikely to investigate office holders and business executives they know, or have no notice of feel a need to investigate the administration of government serving Latins, Blacks or the poor.

Thus, the selection process discriminates economically against Latins, Blacks or the poor. The solution is a random and neutral selection process from the voters registration list.

3. The argument denying there is a wrong: The selection process has resulted over a period of time in the production of grand juries comprised of a representative sampling of Blacks and Latins, and also results in quality grand juries; namely, composed of persons with a high degree of involvement, intelligence, integrity, and belief in justice

Occupation, race, and income are not the issue in establishing a high-quality Grand Jury.

A random selection process will result in a decrease in quality of grand jurors and will not achieve participation of the poor who cannot afford to participate.

B. FOR FINDINGS

1. Statement of the problem:

1.1 Analysis of the arguments and research shows that the problem is not the need to have Blacks, Latins, and the poor to serve on grand juries as an end in itself.

1.2 Rather, the problem is that the way this selection process is designed and/or implemented, the selection process is not achieving as an end quality grand juries; namely, those grand juries who are representative of the interests of all of the people of the community, specifically, in relation to its watchdog of government function.

2. Rationale for the findings:

2.1 There is a perception of a sense of alienation from the Grand Jury system by Black, Latin, and poor groups. See "The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally," U.C.L.A. Law Review, Vol. 20, 1972-1973, Pages 681- citing cases and articles.

The rationale from the above article as would be applied to Dade County would mean: (1) Dade County grand juries perform well relating to the effects of problems they choose to select to review as impacting upon them as members of a class, but do not relate well to the causes of the same problems that impact upon members outside of their class; (2) Dade County grand juries have not performed

well to serve all of the people because they tend to choose to review problems that reflect the familiar needs and interests of the grand juries as members of a class, but not the needs and interests of members outside of their class that they are not familiar with; (3) thus, the failure to produce quality grand juries is caused by the way the selection process is being implemented that produces a specific class of grand jurors.

See Also the Final Reports of the Grand Jury for the 1975 Fall Term and 1976 Spring Term for the description of the problems they reviewed.

2.2 The paramount function of the Grand Jury includes the duty to investigate..."wherever county affairs are being conducted according to law and good morals ...to investigate whether such officials are incompetent or lax in the performance of duties, ...whether they are lacking in the common integrity attached to the duty." Ovens vs. State, 1952, Fla., 59 So 2d 784.

Therefore, to serve all of the people of the county, a quality Grand Jury would be that Grand Jury that represents "...divergent viewpoints held by various political, economic, racial, religious, and social classes within the county." See "The Grand Jury: Vestiges of Aristocracy," Marsh. Pac. Law Review, Vol. 26, Page 49 (1970).

3. A PROPOSED PLAN OF ACTION STRATEGY TO MEET OBJECTIVE TWO

The objective: To identify whether Judge Harold Vann, Presiding Judge of the Grand Jury, and representing the feelings of the other judges, would have an interest in the selection process (1) to maintain it as it is, (2) to reform the process, or (3) whether to recommend the change of the system.

The Forum Division Chairman recommends to invite Judge Harold Vann and Mr. Ben Criswell, of Dade County Grand Jury Association, because of the unusual community interest and because of the Chairman's promise at the Forum.

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MEMORANDUM

ATTACHMENT "D"

TO: CRB Board Council

DATE: January 4, 1977

SUBJECT: January Forum Agenda And Brief

FROM: Rev. Irvin Elligan, Jr.
Forum Chairperson

THE SELECTION PROCESS FOR THE GRAND JURY: DADE CO

For this subject, the speakers shall be the Presiding Judge of the Dade County Grand Jury, Hon. Harold Wann, and the President of the Grand Jury Association of Florida, Inc., Mr. Ben H. Caldwell.

A. BACKGROUND

This subject is a continuation of the December Forum. The CRB Board Council received a Forum Report at its December meeting proposing findings and recommendations.

The CRB Board Council did not determine the question regarding the selection process for the Grand Jury.

The question before the CRB Board Council was whether the selection process was achieving, as an end, quality grand juries; namely, those grand juries who are representative of the interests of all the people of the community, specifically, in relation to its watchdog of government function.

The Forum Report stated that the perception is that the selection process tends to produce White, middle and upper class grand juries who tend to review problems that reflect the familiar needs and interests of members of their class, but tend not to review the needs and interests of members outside of their class that they are not familiar with.

Thus, it was determined by the CRB Board Council to seek to hear the concerns of the Presiding Judge of the Dade County Grand Jury and the proposal of the Grand Jury Association of Florida, Inc., at the January Forum, regarding the selection process.

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a. STATEMENT OF OBJECTIVES

One objective of the Forum shall be to seek from the Presiding Judge of the Grand Jury the interest he may have regarding whether there is a need of assistance in reforming the selection process, or whether there is a need to change the system.

Further, it shall be an objective of the Forum to review the initial proposal by the Grand Jury Association of Florida, and to compare it with the proposal by Representative Alan Becker that was presented at the December Forum.

1. The present system. Under the present system, each of the fifty circuit court judges, sitting as Grand Jury commissioners, nominate ten persons to form a prospective Grand Jury pool of five-hundred names. Then the judges, sitting as Grand Jury commissioners, after screening, choose a venire of ninety persons from this pool (group of persons to be called to serve on the Grand Jury). On the date that they are summoned, the ninety names are put in a drumbowl and the Presiding Judge will draw twenty-three names for the Grand Jury panel.

2. Proposal by Representative Alan Becker. Under the proposal to amend Chapter 40, Florida Statutes, introduced last year in the Florida Legislature by Representative Alan Becker, the function of the circuit court judges sitting as Grand Jury commissioners would be authorized to be eliminated.

In his proposal, the initial pool of grand jurors, the venire, and the Grand Jury panel, would result from a computerized random selection process originating from the county voters registration list and would be administered by an administrative clerk.

This selection process would be similar to the way in which federal grand jurors are selected.

3. Proposal by the Grand Jury Association of Florida, Inc.

Under the proposal by the Grand Jury Association of Florida, Inc., the initial pool of grand jurors would originate from the voters registration list by random selection. However, the screening function of the circuit court judges as jury commissioners would be maintained.

Under this proposal, the judges, as jury commissioners, would select randomly from the Grand Jury pool a tentative venire and discuss the qualifications of the persons, would inquire from any state and local government agency for relevant information, and review responses of questionnaires sent to persons on the tentative venire.

Any Grand Jury commissioner, by a veto, may eliminate any name from the tentative venire list.

(See Sections 14, 15, 16 and 22 for the specific grounds potential grand jurors would be "selected out" as set forth in the proposal by the Grand Jury Association of Florida included in the addendum to this brief, namely, pages 16, 17, 18, 19 and 20 of their proposal).

[illegible]

Excerpt from the proposal by the Grand Jury Association of Florida to revise Chapter 905, Florida Statutes, that would eliminate from Chapter 40 references to the Grand Jury.

[illegible] 14. Duties of grand jury commission.—

(1) From the petit jury pool the grand jury commission shall randomly select, or cause to be randomly selected, from 50 to 100 names of persons in each county of the circuit to be prospective grand jurors. The names shall be placed in a grand jury pool. [illegible] separate and apart from the petit jury pool. The grand jury commission shall randomly select randomly from the petit jury pool names to constitute a master grand jury roster in accordance with the provisions of this act.

(2) As nominees to be placed on [illegible], the grand jury commission:

a. May discuss the qualifications of persons in the manner with respect to sections 12 and 13 of this act and the person's fitness and ability to serve as a grand juror or the likelihood of the person being knowledgeable under section 15 of this act.

b. Shall discuss the qualifications of persons in the manner with respect to whether they are:

1. In possession of felony, or a felony from Florida.

2. A citizen of Florida [illegible] is not a part of [illegible] group.

3. A citizen of Hillsborough County.

4. Persons with a record of one or more arrests for a misdemeanor or felony offense or who having been convicted or [illegible], but if he has been discharged and his civil rights have been restored this shall not disqualify him as a prospective grand juror.

5. Persons known by the state attorney, sheriff, or police departments, as violators of the law.

6. Of sound mind, in possession of [illegible] faculties, and not incapable of [illegible].

7. Persons who for any other reason will not be, in the opinion of the grand jury commission, satisfactory grand jurors.

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(3) The grade [or] commission may contact any state or local government agency for relevant information, which shall be disclosed by them to the grade [or] commission confidentially/ by telephone or in person; the grade [or] commission may inquire into the qualifications and fitness of any prospective grade [or].

(4) Upon receipt of the/required classification test with attendance by the clerk of court to perform on the test/e results, the grade [or] commission shall review the response to the classification and evaluate from the relative value based of points it feels are relative to the job. The classification of grade [or] commission with the powers and duties of the grade [or].

(5) A vote by any one or more grade [or] commissioner shall elevate a case from the relative value test.

Section 12. Qualifications of prospective grand jurors. -- A prospective grand juror shall be:

(1) A citizen of the United States of America.

(2) A resident and registered voter of the State of Florida for one (1) year and of the county for six (6) months.

(3) Able to read, write, and speak the English language understandably.

(4) In support of the constitutions of the United States of America and of the State of Florida.

Qualifications under this section shall be ascertained under oath at voir dire.

Section 1b. Disqualifications of prospective grand jurors. --
A prospective grand juror shall be disqualified by the court if he:

(1) Is a paid officer or employee of any governmental department, bureau, agency, board, or other governmental body.

(2) Is a practicing criminal attorney.

(3) Has ever been convicted anywhere of a crime of bribery, perjury, forgery, or larceny.

(4) Has ever been convicted anywhere of a crime which under Florida law would be a felony and has not since been restored to civil rights.

(5) Has any pending indictment or criminal charge against him anywhere for a felony or misdemeanor involving moral turpitude.

(6) Is under prosecution for any crime in any court anywhere.

(7) Has any present or past alliance, entanglements, or associations with organized crime or with a person associated with organized crime.

(8) Has any present or past membership in any organization proscribed or declared to be subversive by the State of Florida or by the Attorney General of the United States of America.

(9) Would refrain from voting for a finding of probable cause in a capital case irrespective of the evidence.

Disqualifications under this section shall be ascertained under oath at voir dire.

Section 17. Grand jury pool.-- Initially, at least 60 days prior to a grand jury impanelment under this act the grand jury commissioner shall randomly, or caused to be drawn, names from the county petit jury pool to be summoned to the grand jury pool. The chief judge shall determine the number of names to be drawn. There is created grand jury pools may be maintained. Names for the grand jury pool shall be placed in a container such as a drum and shall be thoroughly mixed or stirred for the grand jury commissioner to randomly draw names for the grand jury pools. In the event names were inadvertently or to eliminate names inappropriate to be impanelled, names from the county, indictment, or otherwise permanently unavailable for jurisdiction grand jury pools. The clerk of court shall have custody of the grand jury pool container and keys. Names for the grand jury pool may be randomly selected through electronically stored information or the computer court system from the petit jury pool.

MEMORANDUM

EXHIBIT "E"

TO: CRB Board Council

DATE: January 28, 1977

SUBJECT: January Forum Division Report

FROM: Rev. Irvin Elligan, Jr.
Forum Chairperson

THE SELECTION PROCESS FOR THE GRAND JURY. PART II

The speakers were the Presiding Judge of the Dade County Grand Jury, Hon. Harold Vann, and the President of the Grand Jury Association of Florida, Inc., Mr. Ben H. Caldwell.

A. SUMMARY OF THE DISCUSSION

The question before the Forum was whether or not the Presiding Judge believed there may be ways that the judges and jury commissioners may be assisted in the selection process or whether there is a need to change the system.

The other question before the Forum was whether or not the proposal by the Grand Jury Association of Florida is an answer regarding the selection process.

Judge Vann stated that the present Grand Jury selection process is a process instituted by special legislation by the Florida Legislature which does not apply to any other jurisdiction in the State of Florida.

He claims, as determined by his participating in state conferences of circuit court judges, that no other area in the State of Florida desires the present Dade County system of selecting grand jurors. In other areas, the grand jurors are selected in the same way the petit jurors are, which is, by random selection.

Judge Vann further claims that the circuit court judges here in Dade County, traditionally, and presently, do not desire to be involved as jury commissioners in the selection process. However, he believes that there is no discrimination against

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blacks or Latins or the poor. On the other hand, judges have to appoint those who they know because they have the duty to certify those who are qualified. He claimed that the judges would desire to be relieved from the duty of being involved in the selection process if there were some way to exclude those who were not qualified.

Mr. Criswell reported that the Grand Jury Association of Florida, Inc. proposal is the same as the proposal by Representative Alan Becker in relation to the initial selection process. However, their proposal provides a screening function to exclude those who are not qualified. See the January Forum Agenda and Brief, Page 1.

Mr. Bogart, Clerk of the United States District Court reports that the selection process for the Grand Jury in the federal courts is initially the same as the one proposed by Representative Becker, but also provides a screening process. See below. However, they claim that the screening process is different than the one proposed by the Grand Jury Association of Florida, Inc. They claim that, rather than using subjective criteria, and providing an opportunity for any judge to veto a proposed grand juror, the federal system is much simpler, being implemented by a clerk, where the basis for exclusion is objective.

3. SUMMARY OF ANALYSIS AND POLICY

In the State of Florida, the Grand Jury Association of Florida, Inc. proposes as qualifications, that a prospective grand juror shall be: (1) a citizen of the United States of America, (2) a resident and registered voter of the State of Florida for one year and of the county for six months, (3) able to read, write, and speak the English language understandably, and (4) in support of the Constitution of the United States of America and the State of Florida.

In the present law, or in the proposal by the Association, there is no declaration that all citizens have the right to have an opportunity to be considered for service on grand juries, nor is there any statement prohibiting discrimination on account of race, color, religion, sex, national origin or economic status.

Mr. Bogart, Clerk of the United States District Court, and Mr. Barmaby, Jury Supervisor, United States District Court, have provided CRB information that includes federal statutes, United States courts' regulations and local administrative rules and policies regarding the selection process.

In Title 28, U.S.C.A., Section 1861 declares that all citizens shall have the opportunity to be considered for service on federal grand juries.

Section 1862 provides that no citizen shall be excluded from service as a grand juror on account of race, color, religion, sex, national origin, or economic status.

Section 1863 provides a plan for random jury selection which allows for a plan to be reviewed and modified in order to be consistent with Sections 1861 and 1862.

Section 1864 provides for an objective qualification process through the completion of a juror qualification form.

Section 1865 provides for qualifications for Grand Jury service whereby any person is deemed qualified to serve unless he (she), (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the district; (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak the English language; (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or (5) has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

Section 1866 provides for the random selection and summoning of jury panels. It provides that no person shall be excluded from service except as provided in Section 1865. It further provides that (1) a person may be excused upon the showing of undue hardship or extreme inconvenience, (2) excluded by

the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded upon challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

Section 1866 further provides that the number of persons excluded under Clause 5 shall not exceed one percent of the number of persons who return completed qualification forms, and further provides that no such person be excluded unless the judge in open court makes such a determination and not be inconsistent with Sections 1861 and 1862, and further provides that the names of persons excluded under Clause 5, together with detailed explanations for the exclusions, be forwarded to the judicial council of the circuit for redress for any misapplication.

Mr. Kormsby has sent to CRS information showing that of 161 persons serving on the present seven Miami federal grand juries, there are 20 Blacks, 10 males and 10 females, and 9 persons with Spanish surnames. Of the Blacks, 14 who listed occupations, listed maid, service attendant, assistant supervisor, drug abuse counselor, maintenance worker, maintenance and repair, nurse's aid, teacher, secretary, entertainer, selector, aircraft cleaner, laborer, and letter carrier.

Attorney Jose Villalobos, an auditor to the January Forum, and a concerned citizen of Cuban extraction, has sent to CRS the names and addresses of persons who have been called to the Grand Jury venire for the past several years. For the 1976 Grand Jury Spring Term, of 111 persons, two are Black and none with Spanish surnames. For the 1976 Grand Jury Fall Term, of 66 persons, three are Black, and none with Spanish surnames.

C. RECOMMENDATIONS

Option 1. CRB to present to the Dade County Delegation at its community hearing, and present to the appropriate state legislative bodies, a report proposing the adoption of a selection system for the Grand Jury which shall have provisions similar to the provisions of the federal system for selecting their grand juries. It is further recommended that the per diem be increased from the $10.00 presently available for service by a grand juror to $15.00 per diem (this is $5.00 more than the federal rate per diem). The Forum Committee recommends this option.

Option 2. CRB to present to the above parties a report, but not a specific proposal or recommendation, but a request that there should be a reform and change of the selection process for the Grand Jury because of CRB findings that there is a perception affecting community relations that the selection process is not fair in serving the whole community.

MEMORANDUM

Exhibit "I"

TO	CJA Forum Committee	DATE	February 16, 1977
		SUBJECT	Summary of the Review of Grand Jury Association Proposal by William Kerns Jury Supervisor, U. S. District Court
FROM	Mr. John D. Due Program Officer Forum Division		

Mr. Kerney wrote comments on the Proposed Revision of Chapter 905 F.S. The following is a summary of his comments.

Summary of proposed grand jurors' selection and qualifications:

At the end of Section 11, relating to eligibility for consideration for Grand Jury service, Mr. Kerney wrote that no individual shall have a right to exclude a person from serving by a personal decision.

At the end of Section 12, relating to initial selection of prospective grand jurors, Mr. Kerney scratched out the word "pool" in the statement that the Grand Jury pool shall be randomly selected from the randomly selected petit jury pool, provided the latter selection was from a list of registered voters in Dade County.

Under Section 13, relating to the Grand Jury Commission, proposing that the Grand Jury Commission be composed of the circuit judges of that circuit, Mr. Kerney rejects this whole proposal and section and states that summoning, etc., should be by the clerk of the court.

Under Section 14, relating to duties of the Grand Jury Commission where it proposes the duty to randomly select, proposing that the Grand Jury Commission has power to discuss the qualifications where it proposes that the Grand Jury Commission may contact agencies for relevant information, where it proposes the Grand Jury Commission shall review the responses on the questionnaires and, where it proposes that any one Grand Jury Commission may eliminate a name from a tentative venire list, Mr. Kerney rejects this total section and states that education level, income, social status, are not criteria for anything but showing a degree of bi

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etc., and should not be grounds for service.

Under Section 15, relating to qualifications of prospective grand jurors, Mr.Kennaby rejects the paragraph that a Grand Jury shall be "in support of the Constitution of the United States and the State of Florida", because, as he states, All the citizens are expected to do this.

Under Section 16, relating to disqualification of prospective grand jurors, Mr.Kennaby rejects All nine grounds.

Under Section 17, Mr.Kennaby rejects the proposal regarding the Grand Jury pool. This relates to how the Grand Jury pool is obtained.

Under Section 18, relating to the Grand Jury venire, Mr. Kennaby rejects all four proposals. Section 18 relates to how the Grand Jury venire is obtained. Mr. Kennaby states that the clerk of the court draws and summons the venire that there may be excuses for medical, children, etc. All others shall attend and enter the courtroom—first twenty-three drawn at random which constitute the Grand Jury.

Under Section 19, relating to qualifying the Grand Jury venire, Mr. Kennaby rejects the total proposal.

Under Section 20, relating to exemptions from Grand Jury service, Mr. Kennaby amends the first proposal that would exempt one if one had served within the past five years and is amended to two years. He further amends the proposal to exempt one from Grand Jury if one is a practicing medical or dental doctor, acting clergyman, or a practicing civil attorney, which is amended with the additional statement "if they wish to be excused."

Under Section 21, relating to excuses from Grand Jury service, where the judge may at his discretion excuse a person who is sixty-five years or above, Mr. Kennaby would amend to add "if the person desires to be excused", and where it proposes to

TO: CRB FORUM COMMITTEE
February 16, 1977

excuse a person who is a parent of a young child or children and whose presence is needed at home, Mr. Hornsby would add the words "under ten years" after the words "young child". In other words, Mr. Hornsby recommends the adoption of the federal requirements.

Under Section 22, regarding the challenge to the Grand Jury venire, relating to how, prior to impanelment, the court, the state attorney, and the public defender may orally examine prospective grand jurors, with the state attorney and the public defender having the right to make peremptory challenges, Mr. Hornsby would reject this total proposal, and states that "none of these should have a right to examine or challenge."

Under Section 23, relating to the drawing of Grand Jury panel, Mr. Hornsby rejects the total proposal.

Under Section 24, regarding the Grand Jury's oath, where it initiates a proposal that the court, immediately after the jury is drawn, the court shall administer the following oath.... "you will make true presentments of your findings; unless ordered by the circuit court you will not disclose the nature or substance of the deliberations of the Grand Jury...", Mr. Hornsby would change the words "the jury is impanelled" to the words "the jury is drawn" and he would strike the phrase in the above "unless ordered by the circuit court".

Under Section 26, relating to challenge to individual grand jurors, Mr. Hornsby rejects the total proposal.

Under Section 27, relating to effect of successful challenge, Mr. Hornsby rejects the total proposal.

Under Section 28, regarding effect of omission or commission of error, Mr. Hornsby scratches out the term "any deficiency or excess of names in a Grand Jury pool or venire shall not be deemed to be an error."

Under Section 30, relating to functions of the Supreme Court, Mr. Hornsby rejects the proposal to prepare a prospective Grand Jury questionnaire containing sufficient questions.

Mr. Kornsby also rejected this proposal relating to authority of the Grand Jury, organization of the Grand Jury, and administration of the Grand Jury. These subjects appear to have an impact upon the selection process, therefore, his comments relating to the selection process are included herewith. Mr. Kornsby would reject the proposals that the clerk of the circuit court would have safekeeping custody of the Grand Jury pool; would reject the proposal that the clerk would prepare a list of names drawn from the pool for the venire; would reject the proposal that the clerk would issue questionnaires under direction or supervision of the judge. He would also reject the proposal that the clerk make available the questionnaires upon completion to the Grand Jury Commission, the state attorney, and the public defender.

EXHIBIT "A"

City Hall
Miami, Florida

TELEPHONE

LAW DEPARTMENT
[illegible]

CITY ATTORNEY
[illegible]

SECURITY CITY ATTORNEY
[illegible]

November 22, 1976

Honorable Harold R. Vann
Chief Circuit Court
Dade County
Eighth Circuit
Miami, Florida 33130

Dear Judge Vann:

As you may be aware, the [redacted] City of Miami [redacted] Association [redacted], a copy of which is being [redacted] the [redacted] [redacted] [redacted]

guardian of the police power of the state is a system and means whereby all of the people of Dade County can participate directly in the administration of their government.

PASSED AND ADOPTED this 13th day of November, 1975.

ATTEST:

_____
CLERK

_____
CLERK ASSIST.

APPROVED AND AUTHORIZED BY:

_____
Arthur H. Gerber
Assistant City Attorney

Approved As To Form And Circumstances:

_____
George H. Cole, Jr.
City Attorney

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
	)	
-vs-	)	CASE NO. 77-28650 A
	)	
	)	
MARVIN FRANCOIS,	)	
	)	
Defendant.	)	
	)	

The above-entitled case came on for hearing before The Honorable ELLEN J. MORPHONIOS, Judge of the above-styled Court, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Friday, September 23rd, 1977, commencing at or about 9:00 o'clock A.M.

APPEARANCES:

RICHARD E. GERSTEIN,
State Attorney,
on behalf of the State of Florida.

MARVIN EMORY, ESQUIRE,
on behalf of the Defendant.

• • •

[Thereupon, the following proceedings were had:]

THE COURT: Marvin Francois.

Mr. Emory, arraignment.

MR. EMORY: If it please the Court, in light of the recent development of the Grand Jury situation, we would rather stand mute to these charges.

THE COURT: Okay, entering the maximum plea, giving you the full opportunity subject -- you know the plea is entered subject to your right to file whatever motions you want. Entering the maximum plea of not guilty with a demand for jury trial. Setting it for trial before His Honor, Judge Fuller, on November 7th, together with the Co-Defendant.

You can file whatever motions you desire to, Marvin.

MR. EMORY: Yes, ma'am.

Thank you.

[Thereupon, this hearing was concluded.]

* * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: SS.
COUNTY OF DADE :

I, MONA R. GESSE, do hereby certify that the cause of STATE OF FLORIDA, Plaintiff, versus MARVIN FRANCOIS, Defendant, case number 77-28650 A, pending in the CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA, came on for hearing before The Honorable ELLEN J. MORPHONIOS, as Judge, on Friday, September 23rd, 1977; that I was authorized to and did report in shorthand the proceedings and evidence in said hearing; and that the foregoing pages, numbered from 1 to 2, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings in said cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 20th day of May, 1978.

MONA R. GESSE,
Registered Professional Reporter

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

THE STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	No. 77-28650
vs.	)	
	)	
MARVIN FRANCOIS,	)	
	)	
Defendant.	)	

Metropolitan Justice Building,
Miami, Florida,
Thursday, 12:30 p.m.,
November 3, 1977.

- - -

The above-entitled case came on for sounding before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

- - -

APPEARANCES:

RICHARD E. GERSTEIN, State Attorney, by
ROBERT KAYE, Assistant State Attorney,
Attorney for Plaintiff.

MARVIN EMORY, Esq.,
Attorney for Marvin Francois.

GOODHART & ROSNER, by
DAVID GOODHART, Esq., of counsel,
Attorneys for Beauford White.

THE COURT: Mr. Emory informed me he was in a position where he could not represent one of the defendants in this case. I was waiting for the motion.

MR. KAYE: I was handed a motion today which is probably the motion you are waiting for.

MR. EMORY: Your Honor, I spent some four or five hours with Marvin Francois. Those hours were spent only recently this week.

I do not know whether Your Honor wishes to consider the motion now.

THE COURT: I understand your problem. I do not blame you. I am sure the McKinney trial caused you a backup.

Your motion to withdraw is granted. We will appoint Nathan Diamond to represent Mr. Francois.

Other than that, are we ready?

MR. KAYE: No, Judge. Let me explain the position. We had depositions scheduled for this week.

THE COURT: How is Mr. Sepe?

MR. KAYE: That is their problem.

MR. GOODHART: We had a conversation last week with Mr. Kaye. Yesterday he was in

hearing all afternoon and I received a call. My last conversation with him, he said that he is feeling fine and I think he told you the same as he told me.

MR. KAYE: With limitations.

MR. GOODHART: He would be able to try this case in January, full steam ahead.

MR. KAYE: I was told that the doctor has limited his activities, trial-wise, to either one or two cases. There is one case in November and two in December, and he cannot get to this one in time. He did mention January.

We had an agreement in order to save the State money that we would take the three depositions at one time. We canceled the depositions until Your Honor ruled on the motion by Mr. Emory.

MR. EMORY: Mr. Sepe was not available yesterday.

THE COURT: I just hate to have the guys sitting in the jail.

MR. GOODHART: I do not think you are going to find too many objections from Adolphuis Archie or Beauford White.

Judge, Mr. Sepe is out of town today.

He got called to New York yesterday afternoon.

THE COURT: I have no idea what the circumstances are. Do you want to start the new year out with this case? How is January 9?

MR. KAYE: That will be all right.

MR. EMORY: I was explaining that I had a lengthy conversation with Marvin Francois and brought him up-to-date of the facts, but even if the motion was not granted I would be requesting a continuance, and I told him that would be jointly charged, I believe, in my opinion, to which he understood and agreed.

THE COURT: Whatever you do, Nathan Diamond has agreed to accept that. I knew that you were going to ask to be off the case.

While I would not normally approve of somebody accepting an appointment at this point, but in this instance I understand the situation.

[Whereupon, the sounding was concluded.]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
Criminal Division

THE STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 77-28650
	)	
MARVIN FRANCOIS,	)	
	)	
Defendant.	)	
	)	
----------X		

Metropolitan Justice Building,
Miami, Florida,
Monday, 8:00 a.m.,
November 28, 1977.

The above-entitled case came on for motions before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

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THE COURT: Marvin Francois. I believe it is off the calendar. I know what it was about. Mr. Diamond wanted an evaluation by somebody.

I appointed Dr. Mutter for that purpose. The report date is 12/12.

[Whereupon, the proceedings were concluded.]

- - -

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
Criminal Division

THE STATE OF FLORIDA,

Plaintiff,

vs.

MARVIN FRANCOIS,

Defendant.

Case No. 77-28650

Metropolitan Justice Building,
Miami, Florida,
Tuesday, 8:30 a.m.,
January 3, 1978.

The above-entitled case came on for hearing before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

- - -

APPEARANCES:

RICHARD E. GERSTEIN, State Attorney, by
ROBERT KAYE, Assistant State Attorney,
Attorney for Plaintiff.

BENNETT H. BRUMMER, Public Defender, by
NATHAN DIAMOND, Esq., Specially Appointed
Public Defender.
Attorney for Defendant Francois.

LAW OFFICES OF ALFONSO SEPE, by
ALFONSO SEPE, Esq., of counsel,
Attorney for Defendant Archie.

- - -

THE COURT: Adolphus Archie.

MR. DIAMOND: I am going to need my client. He specifically requested that he be present for all court proceedings from now on.

MR. KAYE: Your Honor, Marvin Francois, Adolphus Archie and Mr. White, Buford White, were supposed to be on the calendar for motions.

Let the record reflect at this time that I received a pack of motions from Mr. Sepe, who represents Mr. Archie, this morning, just before court, which said that he wanted a hearing on the 3rd of January, and he changed that until next week to give me an opportunity to respond.

I have not received any of the motions from Mr. White's attorney although he said the motions are forthcoming.

As far as the motions of Marvin Francois, the only two motions that we---

MR. DIAMOND: One is severance, and I will forego the motion to dismiss, today.

I have talked to Mr. Kaye and really we have been discussing it all along in terms of discovery in the case. At this time I think he will concede that there is no way around severance as to the defendant, Marvin Francois.

THE COURT: He is the one that did not make a

statement?

MR. DIAMOND: Yes, but the two co-defendants did make statements implicating him.

Also with regard to Mr. Francois, I understand he is also set for trial next week. I was in court once before with Mr. Kaye and I advised the Court, and at this time I am convinced, as I was in the statements that I made to the Court on prior occasions, that there is no way I am going to be able to get this thing to trial for next week.

THE COURT: Do you agree with his petition for severance, Mr. Kaye?

MR. KAYE: Yes, Judge.

For the record, I would say that there are statements incriminating him from Adolphus Archie and Buford White. There is no statement from Francois.

THE COURT: The statements from White and Archie cannot be handled in such a manner as to not violate the rule?

MR. KAYE: I think that would be impossible.

MR. DIAMOND: Secondly, Your Honor, I have a---

THE COURT: What about the timing relative to the trial?

MR. DIAMOND: The only other motion that I filed is the motion to dismiss the Grand Jury indictment based on the Blue Ribbon Grand Jury and requesting an

evidentiary hearing on that point, but it--I am going to forego any arguments on that. In fact, I am not going to ask for a hearing on it until a later date simply because I do not think there is any way I can get this case to trial by next week.

This is the first deposition I received back. It numbers some 260 pages of testimony. I received it on Friday.

THE COURT: What is your situation on time, Mr. Kaye?

MR. KAYE: On time?

THE COURT: Do you agree that he is going to have an impossible task to get ready by next week?

MR. KAYE: No. I do not agree to that. I understand he has some problems---

THE COURT: What about the other defendants?

MR. KAYE: I do not know what their problems are. Apparently they are the same as his.

THE COURT: Be here promptly at nine o'clock on Friday morning. I told you before I will not push you to try the case if due diligence has been taken, but I am not going to wait here on Monday morning.

MR. KAYE: One of the motions is a motion to suppress which will be rather lengthy.

MR. DIAMOND: That--I do not have any suppression problems. As I understand it, there is no physical evidence,

there is no statement with regard to my client.

THE COURT: What are the other motions?

MR. DIAMOND: Judge, here is Mr. Sepe, and I think Mr. Dougherty is here on behalf of Mr. Goodhart.

I have not received any copies of any motions filed in this case. I understand Mr. Sepe---

MR. KAYE: Some of the motions being disposed of, I think, today--- Just to fill you in, the Court was thinking of hearing motions on Friday.

MR. SEPE: Whatever the Court wants.

MR. KAYE: As far as the motion to compel is concerned, the State has no objection to 1 and 2. The Court would have to rule on 3 and 4.

MR. SEPE: I hope you understand, Your Honor, I was not expecting this to be heard today. That is why there seems to be some disorder--- I do not know what this is about.

THE COURT: Go ahead.

MR. KAYE: So far as 3 is concerned, I think Detective Derringer has stated in his deposition that he did not retain the notes.

MR. DIAMOND: I believe so.

MR. KAYE: So I do not think there are any--as far as No. 4 is concerned, I think that would be a waste of time.

I have gone through the copious copies of the

police reports which would be about an inch and a half to two inches thick. I do not think there is anything in there relating to Brady. I think I have given counsel all the Brady material I have.

However, if the Court wants to read---

THE COURT: I think counsel takes the position that he would rather not have it heard in court today.

MR. SEPE: That is correct, Your Honor.

THE COURT: I will be glad to review it.

MR. KAYE: The only other problem I have is the copying of it. It is rather thick.

As far as No. 4 is concerned---

THE COURT: And put a copy of the motion on top of it so I will know what I am reviewing.

MR. DIAMOND: While we are on this motion to compel, I just had an opportunity to read it. There was a problem that occurred during the depositon of Mr. Dubois, the polygraph examiner who examined Mr. Sepe's clients and two other witnesses in the case

During the course of the deposition, I requested to see the charts that Mr. Dubois ran, for my own edification as well as possibly making that available for an expert that I intended to hire to review Mr. Dubois' conclusions.

At that time Mr. Sepe objected on behalf of his

clients Adolphus Archie, to my having copies of his client's polygraph charts.

I think I would be entitled to them pursuant to the rule, and I really do not see any grounds by which Mr. Sepe would have any standing to---

THE COURT: Is that up today? Is there a motion filed?

MR. DIAMOND: We were going to discuss it with the Court today. That was by agreement with Mr. Kaye, because it came up during the deposition.

MR. KAYE: It came up during the deposition and at this point, Your Honor, the State's position is that I would make available to all counsel whatever material is in the possession of Mr. Dubois.

MR. DIAMOND: All right.

MR. SEPE: On behalf of Mr. Archie, Mr. Archie's position and objection is predicated on the fact that the chart itself is not admissible into evidence, and it is not a matter that should be the subject of an examination by any other expert.

If any other defendant wants to utilize an expert to contradict one of the State's experts, then that expert is free to conduct his own polygraph testimony in this matter, but the polygraph expert material cannot come out in court, anyway. You cannot call a polygraph expert to

analyze another polygraph expert's chart in court. That is not going to be part of this case.

THE COURT: What is the purpose of it?

MR. DIAMOND: I do not know what it is, Judge. Mr. Dubois was listed as a possible State's witness. My understanding of the law is that he cannot testify to any conclusions. I do not know that he can testify to any statements he overheard or to the charts themselves.

I am not talking about conclusions--certainly Mr. Sepe would have the right to object at trial to any conclusions Mr. Dubois might come to, but I do not think he can object to me reviewing the charts which possibly could be evidence.

THE COURT: What else do we have?

You are going to provide me with the matters of Rule 4. You take the position that there are no matters in 3.

What else?

MR. KAYE: There was another motion. I am not concerned--I am willing to argue this motion at this time. I would rather hold that one off until Friday.

MR. SEPE: All right. It is the motion for the mental examination.

THE COURT: Let us do that on Friday, whatever motions you have.

MR. KAYE: The only thing I do tell the Court is that the motion to suppress is apt to be somewhat lengthy, Friday.

MR. SEPE: It is not going to be as lengthy as Mr. Kaye would suggest, but it will be longer than a bill of particulars position.

THE COURT: If I have any scheduling problems between now and then, I will let you know. Let us go ahead and set it for nine.

MR. DIAMOND: I have a two-thirty flight on Friday.

I do not have any other motions at this time.

THE COURT: All I know is there is an Archie motion for Friday and whether or not there will be motions by White, we will have to wait and see. So, at this point, we will set Adolphus Archie.

I think he has a motion to continue that is to be heard so you will need them both.

MR. SEPE: On behalf of Adolphus Archie, I am joining in the motion for continuance that Mr. Diamond spoke of.

[Thereupon, the hearing was concluded.]

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
Criminal Division

THE STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 77-28650
	)	
MARVIN FRANCOIS,	)	
	)	
Defendant.	)	
	)	
----------X		

Metropolitan Justice Building,
Miami, Florida,
Tuesday, 9:00 a.m.,
February 21, 1978.

The above-entitled case came on for motions before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

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APPEARANCES:

JANET RENO, State Attorney, by
ROBERT KAYE, Assistant State Attorney,
Attorney for Plaintiff.

PENZELL & DIAMOND, by
NATHAN DIAMOND, Esq., Specially Appointed
Public Defender,
Attorney for Defendant.

LAW OFFICES OF ALFONSO SEPE, by
ROBERT DEAN SMITH, Esq., of counsel,
Attorneys for Archie.

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BERT FRIEDMAN CIRCUIT COURT REPORTER

MR. DIAMOND: I have motions set on Friday in this case. I briefly discussed it with the State. I think there are only two that should be heard this morning.

One is a motion to produce. It states in that motion that Adolphus Archie, formerly a defendant in this case and presently a State witness in this case, gave a statement during the course of his representation that was tape-recorded to Mr. Sepe, his defense counsel. I would like a copy of that statement pursuant to Rule 3.220 which gives me the right to have all statements that are known to the State. There is a tape-recorded statement. I would like the tape-recorded statement or the transcript of that statement. It is still in Mr. Sepe's possession.

I do not think the lawyer-client privilege would apply any longer in that during the course of my deposition Mr. Archie freely waived that privilege in discussing with me all of his conversations with his defense lawyer, Mr. Sepe.

MR. KAYE: In response, I do not have these tapes. I have never been made privy to these tapes. They are not in the possession of the State.

The only information we had was that we knew Mr. Sepe had taken some statement. Mr. Sepe's office has been made aware by me of this motion. I would ask, number one, that Mr. Sepe be here to respond since he represented

Mr. Archie and they are in his possession or, perhaps, Mr. Smith can respond at this time.

MR. SMITH: I advised Mr. Sepe concerning the State's request for that or Mr. Diamond's request. Mr. Sepe indicated there would not be any problem. He wanted to get back with Mr. Kaye. He has been tied up in West Palm and had not had an opportunity to do that. He will be available, I would think in the next two to three days.

THE COURT: Let me know on Thursday. I want to see what his position is before I rule on it. Mr. Smith can find out and get back to me.

MR. DIAMOND: The other motion I think the Court should entertain at this time--the other can probably wait until the time of trial--is the motion for statement of aggravating circumstances. As the Court knows, in a murder trial there are two portions of the trial. The first portion is dealing with the guilt or innocence and the second portion dealing with whether the jury is going to recommend mercy in that it is going to recommend to the Court to sentence the defendant to a life term in prison or the death penalty.

I think the due process should require that the defendant be made known of all circumstances the State intends to prove up in the second portion of its trial assuming there is a verdict of guilty of murder in the first degree.

I think the defendant should have notice as to what aggravating circumstances the State intends to prove up in the second portion of the trial. I think the defendant should be given notice of that and have an opportunity to respond to it.

THE COURT: Do you wish to respond?

MR. KAYE: It seems somewhat premature at this time. The elements of aggravating circumstances are fairly well delineated within the rules and only go along certain lines. I am sure he knows as much about this as the State does at this time.

THE COURT: The motion is denied at this time. You may want to bring it up later. They are outlined by statute. I think you are quite competent. Otherwise, I would not have appointed you.

MR. DIAMOND: I understand what the rules are. I am asking for the facts the State is going to prove up.

THE COURT: That is denied.

MR. DIAMOND: Without prejudice?

THE COURT: Yes.

MR. DIAMOND: The motion to produce I will get notice on when?

THE COURT: As soon as you tell me what Mr. Sepe's position is.

MR. DIAMOND: I do not know that he has a position

at this time.

THE COURT: I do not, either.

MR. DIAMOND: I do not know if he has standing to raise any position.

THE COURT: He has the same standing to raise a position as he does to be called upon to produce something. I want to hear his feelings as to attorney-client privilege.

MR. DIAMOND: As I say, I have taken quite extensive deposition of Mr. Arenie wherein he discusses his entire conversation with Mr. Sepe. He does state there was a tape-recording made by Mr. Sepe and I am not privy to that statement.

MR. KAYE: It was the Buford White case. I have discussed it with Mr. Goodhart and we know Mr. Diamond has depositions scheduled all this week which relate to both defendants as far as witnesses are concerned. I would like very much to try the case on Monday.

MR. DIAMOND: I am set for trial on Monday.

THE COURT: In White?

MR. DIAMOND: No, I am set for trial in Francois.

THE COURT: Yes. I know. We are glad to have you around.

MR. DIAMOND: I thought it was specially set. That is the only reason I wanted to bring it to the Court's attention.

THE COURT: I set a number of them with the team before.

MR. DIAMOND: I am trying to get this thing to trial.

THE COURT: I can tell. I am overwhelmed by your effort, Mr. Diamond.

[Whereupon, the proceedings were concluded.]

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
Criminal Division

THE STATE OF FLORIDA,

Plaintiff,

vs. Case No. 28650

MARVIN FRANCOIS,

Defendant.

Metropolitan Justice Building,
Miami, Florida,
Thursday, 9:00 a.m.,
February 2[illegible], 197[illegible].

- - -

The above-entitled case came on for motions before The Honorable Richard S. Fuller, Circuit Judge pursuant to notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
ROBERT KAYE, Assistant State Attorney,
Attorney for Plaintiff.

PENZELL & DIAMOND, by
NATHAN DIAMOND, Esq., Specially Appointed
Public Defender,
Attorney for Defendant.

- - -

MR. KAYE: May I state on the record, while we are waiting for Mr. Francois, the position of the State?

We have been in contact with Mr. Sepe's office. He has no objection to turning over the tape and the State has no objection to turning over the tape. It puts us in the position of---

MR. DIAMOND: I would like to do this in front of my client. I do not necessarily want to. I am saying he wrote a letter to the Court that he has not been present for the meetings that are heard.

THE COURT: He need not be here.

MR. DIAMOND: I would waive his presence if he did not write this letter to the Court and advise me.

THE COURT: I have not seen any letter where he says that. I am glad to have people over.

MR. KAYE: I have no objection to him being here.

THE COURT: You just do not want to wait around.

MR. KAYE: I talked to Mr. Smith. He talked to Mr. Sepe. He said it is all right with the exception that they have to talk to Mr. Archie.

THE COURT: Archie is the fellow who has to relieve Mr. Sepe of his responsibility under the attorney-client privilege and you may have taken that deposition giving you all of that information, but if there is a specific item wanted I think it is a matter of getting Mr. Archie over

here and having him agree or advise his counsel it is all right to do so.

Mr. Smith was going to call this morning and report back. I want him to report back.

MR. DIAMOND: I do not necessarily want to wait. You start getting this kind of grief.

THE COURT: You know, I think lawyers should run their cases.

MR. DIAMOND: I am running the case. No problem with that. He just wants to be here to hear what I have to say.

[Thereupon, the defendant entered the courtroom.]

MR. DIAMOND: Now the defendant is present. I think the State stated their position previously. They are not opposed to my getting the transcript or tape or whatever it is.

MR. KAYE: The State's position is that we are aware that Mr. Archie has given some taped statement to his lawyer. Mr. Archie on his deposition told Mr. Diamond essentially what was in those tapes.

Mr. Diamond has sought to have those tapes. I do not, and the State does not, have them. They are in the possession of the defense lawyer, Mr. Al Pope. He has been contacted by both sides and indicated to me he is

willing to turn the tapes over to us providing he gets the approval of Mr. Archie which he is seeking today. That is where we stand at this point.

THE COURT: Who is going to bring Mr. Archie before us or will there be an affidavit?

MR. KAYE: I do not think it is necessary to bring Mr. Archie forward. I think the representation of his attorney will be enough for the State.

MR. DIAMOND: I think once there is a breach in this case, when I take his deposition for two days and he told me throughout about his conversation with his attorney, I do not think it applies anymore.

THE COURT: It may or may not. I like to act in an abundance of caution, just like we waited for Mr. Francois even though it was not critical to his trial. We waited for him and the same goes for Archie. An affidavit releasing Mr. Sepe from the attorney-client privilege would be appropriate.

MR. KAYE: I will find out from Mr. Sepe and I will contact Mr. Diamond.

MR. DIAMOND: While we are still before the Court, the other day I left my card with the court reporter and asked that she send or prepare a transcript of Mr. Archie's sentencing for me. I received a call from the court reporter's firm to the effect that since I was "appointed,"

I would have to have approval from--I am not sure what.

THE COURT: There is one filed in the Clerk's file. All you have to do is photocopy it.

[Whereupon, the proceedings were concluded.]

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

THE STATE OF FLORIDA,)

Plaintiff,)

vs.) NO. 77-28650A
77-28650B

MARVIN FRANCOIS and)
BEAUFORD WHITE,)

Defendants.)

- - - - - - - - - - - - - - - - - x

Metropolitan Justice Building,
Miami, Florida,
Monday, 11:00 a.m.,
February 27, 1978.

The above-entitled case came on for hearing before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
ROBERT KAYE, Assistant State Attorney,
Attorney for Plaintiff.

PENZELL and DIAMOND, by
NATHAN DIAMOND, Esq., of counsel,
Attorneys for Defendant Francois.

GOODHART and ROSNER, by
DAVID GOODHART, Esq., of counsel.
Attorneys for Defendant White.

- - -

MR. KAYE: Judge, we are here for the trial of either Beauford White or Marvin Francois. We are ready.

MR. GOODHART: I am ready.

MR. DIAMOND: I am ready.

MR. KAY: We would like to have some indication from the Court when we would start jury selection.

THE COURT: I thought I indicated earlier it would be about one-ish. I left a message, as a matter of fact.

MR. GOODHART: I did not hear until eleven o'clock.

MR. DIAMOND: Beauford White is going to go first?

THE COURT: Yes, sir.

MR. DIAMOND: Marvin Francois will follow?

THE COURT: He will follow that. I am not sure what order.

I also have another case called Alonzo Bryant, which I anticipate trying between those two.

MR. DIAMOND: Do you want me on a standby basis?

THE COURT: I will call you, Nathan.

MR. DIAMOND: I will probably be around.

MR. GOODHART: Is it sufficient if we report back at one?

THE COURT: I do not know how fast I am going to move here. It may be later than that.

MR. GOODHART: I will report back at one.

MR. KAYE: Let me advise the Court at this point, I conferred with counsel on how long it might take to select a jury, and he indicates it would probably be a lengthy jury selection.

You indicated to have witnesses ready, and I do not really know how to work that. We could spend the afternoon picking a jury and take testimony tomorrow.

THE COURT: I do not anticipate you taking a full afternoon to pick the jury.

MR. GOODHART: If it please the Court, I have an appointment between five-thirty and six o'clock in my office. I would beg the Court's indulgence in that regard.

I do not know how long it will take to pick a jury.

THE COURT: I will work with all of you as best I can as long as I am satisfied you men are

working to move your cases. I will certainly do what I can to help you.

I am not here to set a marathon, but there is no reason for repetitious questions on voir dire.

MR. KAYE: I would hate to have to bring civilians in today and have them wait.

THE COURT: I do not know how many witnesses you have or your order of proof. Perhaps it may be sufficient to make opening statements or maybe have a police officer standing by or something.

I will work with you.

[Thereupon, the hearing was concluded at 11:05 a.m.]

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CERTIFICATE OF REPORTERS

STATE OF FLORIDA)

COUNTY OF DADE)

We, the undersigned, do hereby certify that hereinbefore we reported in the case of The State of Florida, Plaintiff, versus Marvin Francois, Defendant, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Criminal Division, the proceedings were heard on December 3, 1977, December 12, 1977, January 9, 1978, February 21 and 23, 1978, and February 27, 1978, before The Honorable Stewart S. Miller, Judge thereof, duly authorized to and did report in shorthand the proceedings and evidence presented in said cause and that the foregoing pages, numbered 1 to 23 inclusive, constitute a true and correct transcription of our respective shorthand reports of the proceedings had in said cause.

We further certify that the rates of our respective original reports of the proceedings had in said cause are set forth below complete our respective statements.

DATED this ____ day of June, 1978.

	Dates of Attendance
LESTER M. SACHARTOFF	November 3, 1977
MARGARET ROCK	November 29, 1977, February 21 and 23, 1979
CATHRINE NORTON	January 3, 1979
GAIL P. DONNELLY, RPR-CP	February 27, 1979

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

THE STATE OF FLORIDA,)

Plaintiff,)

vs.) No. 77-28650A

MARVIN FRANCOIS,)

Defendant.)

- - - - - - - - - - - - - -x

Metropolitan Justice Building,
Miami, Florida,
Monday, 11:42 a.m.,
April 17, 1978.

The above-entitled case came on for motions and motion to suppress before The Honorable Richard S. Fuller, Circuit Judge, pursuant to notice.

- - -

APPEARANCES:

JANET RENO,
State Attorney, by
ROBERT KAYE,
Assistant State Attorney,
Attorney for Plaintiff.

PENZELL and DIAMOND, by
NATHAN DIAMOND, Esq., of counsel,
Attorneys for Defendant.

- - -

I N D E X

MOTION TO SUPPRESS - 4/17/78

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
William Clay	7	28	33	
Johnnie Hall	37	40		
Leonard Glick	50	53		
Fred Graves	57	62	67	
Detective Robert Derringer	69	71		

EXHIBITS

State's	For Ident.	In Evidence
1-A, 1-B and 1-C	29	
No. 1		30
2		32
3		33

TRIAL - 4/18/78

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Charles Edward McKinney	273	278		
Victoria Levy Williams	280	291	283	
Herman E. Jarvis	284			
Julius Davis	294	302		
Detective David Rivers	303	324		
Detective William Shinego	327			
Leonard Bednarczyk, M.D.	357			

I N D E X [continued]

TRIAL - 4/18/78 [continued]

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Margaret Wooden	367	440	464	465
Johnnie H. Hall	466	509	546	546
Detective Robert Derringer	547	600		
Detective Robert Derringer [continued]		669	697 753	727
Theresa Rolle	762	778		
Adolphus Archie	792	835		

EXHIBITS

State's	For Ident.	In Evidence
1-A, 1-B, 1-C and 1-D	274	
1-A, 2-A, 3-A and 4-A		278
1-E	280	
1-F	283	
5-A and 6-A		284
No. 7		290
8		316
9		320
10		331
12, 13, 14, 15, 16, 17 and 18		332
19		356
1, 2, 3, 4, 5 and 6		356
22, 23, 24, 25 and 26		569
20		577
11		579
X		726

CHARGE TO JURY - Page 1084

I N D E X [continued]

SENTENCING - 4/24/78 - Page 1142

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Beetle Bailey	1153	1162		
Maria Korvick	1163	1165		
Muriel Hollingsworth	1174	1176		
Dolores Jolly	1177			
Mary Cooke	1179	1180	1181	
Evalda King	1182	1184		

EXHIBITS

State's	For Ident.	In Evidence
1-A Composite No. 1	1155	1153

MOTION FOR NEW TRIAL - 5/22/78 - Page 1240

MR. DIAMOND: Your Honor, just before we start on the motion to suppress, I am not sure what pretrial motions have at this point been granted and have not, because of the fact that we have three defendants. Now there are four. Well, four defendants have been charged throughout.

There were motions to adopt based on all motions previously filed. I filed a motion to dismiss the grand jury indictment in this case originally. I believe it was dismissed--I mean, it was not dismissed by this Court. It was dismissed in other courts with regard to these defendants. This Court did not dismiss the indictments against them.

THE COURT: That is true. I find the grand jury was legally constituted, and I deny the motions.

MR. DIAMOND: Fine.

I guess we can go on with this motion. Then we will proceed with some of the others.

Regarding sequestration of jurors---

THE COURT: You have to tell me--you name your motions, and we will get to them one at a time.

MR. DIAMOND: All right.

Sequestration of jurors--I do not know what the Court intends on doing with regard to that. Since we will be picking a jury this afternoon,

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.185 Sentence; restitution a mitigation in certain crimes.
921.20 Classification summary; Parole and Probation Commission.
921.21 Progress reports to Parole and Probation Commission.
921.22 Determination of exact period of imprisonment by Parole and Probation Commission.
921.231 Presentence investigation reports.
921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(36); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(36); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 227a, ch. 19554, 1939; CGL 1940 Supp. 8663.246; s. 119, ch. 26.339; s. 1, ch. 72.72; s. 9, ch. 72.724; s. 1, ch. 74.379; s. 248, ch. 77.104; s. 1, ch. 77.174.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19554, 1939; CGL 8628, 8629; CGL 1940 Supp. 8663.270; s. 123, ch. 74.379.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 261, ch. 19554, 1939; CGL 1940 Supp. 8663.271; s. 124, ch.

commissioners of the county shall pay to the county tax collector from the county general fund, the difference in the amount actually received and the sum of seven thousand five hundred dollars ($7,500.00).

Section 3. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

CHAPTER 57-549

SENATE BILL NO. 485

AN ACT relating to county commissioners in all counties having a population of not less than five thousand eight hundred (5,800) and not more than five thousand nine hundred (5,900) according to the last official state-wide census, providing salary increase for commissioners, providing effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. In all counties having a population of not less than five thousand eight hundred (5,800) and not more than five thousand nine hundred (5,900) according to the last official state-wide census, the county commissioners shall receive a salary of twenty-four hundred dollars ($2400) per annum, to be paid in twelve (12) equal monthly installments.

Section 2. This act shall become effective immediately upon its becoming law.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

CHAPTER 57-550

SENATE BILL NO. 478

AN ACT to create a Grand Jury Commission in all counties in this state having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census, and

generally relating to the grand jury in such counties, and repealing Chapter 26,518, Acts of 1951, Laws of Florida, Chapter 30,225, Acts of 1955, laws of Florida, Chapter 28,368, Acts of 1953, Laws of Florida, and all laws in conflict with the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census.

Section 2. There is hereby created a Grand Jury Commission composed of ten members as follows: the Clerk of the Circuit Court, Chairman of the Board of County Commissioners, County Supervisor of registration, Clerk of the Criminal Court of Record, and the County Judge having served for the longest, continuous term shall, each, be members of the Grand Jury Commission, and the five (5) remaining members of the Grand Jury Commission shall be appointed by the Governor, who shall appoint one (1) member from each County Commissioners' district. The term of office of each of the appointive Grant Jury Commissioners shall be four (4) years, and upon this act becoming a law the Governor of this state shall appoint three (3) Grand Jury Commissioners for a term of four (4) years and two (2) Grand Jury Commissioners for a term of two (2) years, and thereafter all appointive Grand Jury Commissioners shall be appointed for a term of four (4) years. There shall be a Chairman of the Grand Jury Commission to be elected by the members, and the Clerk of the Circuit Court shall be the Secretary.

Section 3. The Grand Jury Commission may employ such clerical assistants as may be necessary in order that it may function properly. The Board of County Commissioners of the County shall pay such assistants such sums as said Board may determine, and shall also furnish the Grand Jury Commission with such supplies and equipment as may be required in order to permit the proper functioning of the Grant Jury Commission. The compensation of such assistants, and the cost of such supplies and equipment, shall be paid out of the Fine and Forfeiture Fund of the County.

Section 4. The grand jurors in each County in this population

classification shall be paid the sum of five dollars ($5.00) for each day when in session, or in court, or such sum as the general laws of the State of Florida may provide for the payment of grand jurors, whichever may be the greater. Such payment shall be made as now provided by law. That in addition to all other compensation provided by law, each grand juror shall receive the sum of five cents (5c) per mile for every mile necessarily traveled in going from home to the courthouse, and return, when on official grand jury duty, whether attending Court, grand jury sessions or other grand jury meetings or business.

Section 5. The qualifications of persons to serve as grand jurors are as follows:

(a) Shall be a citizen of the United States of America, and a qualified elector and resident of the County.

(b) Shall be of sound mind, in possession of his, or her natural faculties and not infirm or decrepit.

(c) Shall not have been convicted of a felony or of a misdemeanor involving moral turpitude in any court within or without this state.

(d) Shall not have any pending criminal charges against him, or her, of a felony or of a misdemeanor involving moral turpitude in any court within or without this State.

(e) Shall be of good moral character, and shall be free of any present or past alliances, entanglements and associations with organized crime or with those associated therewith.

(f) Shall not be a member of any association or organization prohibited or declared to be subversive by the laws of the state of Florida or declared to be subversive by the Attorney General of the United States of America pursuant to law.

(g) Shall be intelligent, well informed and able to read and write the English language understandingly.

(h) Shall not be a public officer or employee of the United State of America, the State of Florida or any county or city therein, but this prohibition shall not apply to any person serving without compensation, pursuant to the provisions of the United States Selective Training and Service Act, or any future draft law, nor to

any person serving in the Militia or National Guard of this State.

(i) Attorneys-at-law shall not serve on the grand jury, and doctors of medicine, dentists and clergymen shall be excused upon request.

(j) Shall not have served on a grand jury in the County within a period of the last five (5) years.

Section 6. The Grand Jury Commission shall meet annually, on or before the first Monday in March of each year, and prepare a list of five hundred (500) names of persons qualified under the provisions of this act, and morally fit to serve as grand jurors, and shall file the same with the Clerk of the Circuit Court, and the names of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the list itself in a secure metal box to be known as the "GRAND JURY BOX", which shall be securely locked and sealed, and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission.

In preparing a list of names of prospective grand jurors, as provided by this act, the Grand Jury Commission shall make such investigation as it may deem necessary to determine the qualifications and moral fitness of persons to serve upon the Grand Jury. That upon the GRAND JURY BOX becoming depleted of names, the Grand Jury Commission shall immediately meet and refill the same, as provided by this act.

If the list of names of prospective grand jurors or the number of names of prospective grand jurors written on slips of paper and placed in the GRAND JURY BOX is more, or less than five hundred (500), it shall not affect the validity of the GRAND JURY BOX or any Grand Jury drawn therefrom.

Section 7. That the Grand Jury shall be drawn as provided by law; however, the members of the Grand Jury Commission shall be notified by the Clerk of the Circuit Court of the time and place of drawing the Grand Jury, and a majority of the members of the Grand Jury Commission shall appear at the drawing of the Grand Jury, and be present when the seal on the GRAND JURY BOX is broken and the box unlocked and when the Grand Jury is drawn,

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passage and approval by the Governor, or upon becoming a law without such approval.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

CHAPTER 57-531

SENATE BILL NO. 477

AN ACT to provide for rotating circuit judges who shall draw, empanel and preside over the grand jury during each term of circuit court in all counties in this state having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census, and providing for the excusing of persons summoned for grand jury service, and other matters relating thereto.

Be It Enacted by the Legislature of the State of Florida:

Section 1.—That in all counties in this state having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census, the Grand Jury shall be drawn, empaneled and presided over during each term of Circuit Court on a rotation basis among the several Circuit Judges, beginning with the Circuit Judge designated as "Division A" and continuing alphabetically as to the remaining divisions of the Circuit Court, provided that if any circuit judge is unable to draw, empanel and preside over the Grand Jury then the Circuit Judge designated as the next alphabetical division of the Court shall so act in his stead.

That no person summonsed to serve as a grand juror shall be excused by any Circuit Judge except the Judge who draws, empanels and presides over the Grand Jury.

Section 2.—That all laws and parts of laws in conflict herewith be and the same as hereby repealed insofar as they affect the provisions of this act.

Section 3.—If any part of this act is declared invalid, or unconstitutional, it shall not affect any other part thereof.

Section 4.—This act shall take effect immediately upon its pass-

insured relied upon a law preventing rate increases; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. In the event that a law preventing increases on automobile insurance policy premium rates effective July 1, 1970, should be found to be invalid, no insurance policy in effect on July 1, 1970, or renewed in reliance of such law, shall be declared cancelled or invalid. Provided, however, that the policy holder shall be required to remit, within 30 days after receiving written notice from the insurer of an increase in rates, the difference between the rate on July 1, 1970, and the rate set by the insurer. Such notice shall not be effective unless sent to the insured after a law preventing the increase of rates is declared invalid.

Section 2. This act shall take effect immediately upon becoming law.

Approved by the Governor October 23, 1970.

Filed in Office Secretary of State October 23, 1970.

CHAPTER 70-1000

Senate Bill No. 1478

AN ACT relating to grand jury commissions; in all counties having a population in excess of four hundred fifty thousand (450,000), amending sections 1 and 2 of chapter 57-550, Laws of Florida, 1957; providing that the grand jury commission be composed of the circuit judges of the judicial circuit encompassing the geographical area of the county; providing for a chairman and secretary; providing all laws and parts of laws in conflict herewith be repealed; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four

hundred fifty thousand (450,000) or more, according to the last previous federal census.

Section 2. Section 2 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 2. There is hereby created a grand jury commission composed of the circuit judges of the judicial circuit encompassing the geographical boundaries of all counties referred to in section 1 of this act. The chairman of the grand jury commission shall be elected by its members and the clerk of the circuit court shall be the secretary of the grand jury commission.

Section 3. All laws and parts of laws in conflict herewith are repealed.

Section 4. This act shall take effect September 1, 1970.

Vetoed by the Governor July 5, 1970.

Passed the Senate and House over the Veto October 9, 1970.

Filed in Office Secretary of State October 13, 1970.

CHAPTER 70-1001

Senate Bill No. 1507

AN ACT relating to Citrus County, hospital and medical nursing and convalescent home act; amending sections 3, 5 and 16 of chapter 65-1371, Laws of Florida, by increasing the maximum interest rate for all debts and obligations of the hospital board; increasing the number of banks which are authorized to act as depositories for hospital funds; providing for senate approval and confirmation for the appointment of trustees; providing for ambulance service; authorizing the charging of interest on patients' accounts, discounting and collecting accounts and debt obligations; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act shall be known and may be cited as the first amendment to the Citrus County hospital and medical nursing and convalescent home act, chapter 65-1371, Laws of Florida.

(i) Failure to follow any of the procedures in this Rule shall not render a plea void absent a showing of prejudice.

Adopted Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

Committee Note

1977 Adoption. New in Florida. In view of Supreme Court's emphasis on the importance of this procedure as set forth in Williams v. State, 316 So.2d 267 (Fla.1975), Committee felt it appropriate to expand the language of former Rule 3.170(j) (deleted) and establish a separate rule. Incorporates Federal Rule 11(e), and allows for pleas of convenience as provided in North Carolina v. Alford, 91 S.Ct. 160, 400 U.S. 25, 27 L.Ed.2d 162 (1970).

(a), (b) Mandatory record of voluntariness and factual predicate is proper responsibility of counsel as well as the court.

(c) This waiver of right to appeal is a change from the proposed amendments to the Rules of Criminal Procedure now pending. A sentence if lawful is not subject to appellate review; a judgment, however, is. The Committee was of the opinion that the proposed rule should be expanded to include a waiver of appeal from the judgment as well as the sentence. Waivers of appeal have been approved. State v. Gilmore, 68 N.J. 499, 349 A.2d 769 (1975); United States Ex Rel. Amuso v. LaVallee, 291 F.Supp. 383, aff'd 427 F.2d 328 (1970); Tingle v. Williams, 36 N.Y.2d 829, 370 N.Y.S.2d 904, 331 N.E.2d 684 (N.Y.Ct.App.1975).

(d) Requires the court to explain the plea agreement to the defendant including conditions subsequent such as conditions of probation.

(e) Provides a readily available record (either oral or by use of standard forms) in all cases where a felony is charged.

(h) Rewording of Rule 11(h)(6) of the Federal Rules of Criminal Procedure.

Rule 3.180. Presence of Defendant

(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

(1) At first appearance;

(2) When a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of Rule 3.170(a);

(3) At any pre-trial conference, unless waived by Defendant in writing;

(4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

(5) At all proceedings before the court when the jury is present;

(6) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;

(7) At any view by the jury;

(8) At the rendition of the verdict;

(9) At the pronouncement of judgment and the imposition of sentence.

(b) Defendant Absenting Himself. If the defendant is present at the beginning of the trial and shall thereafter, during the progress of said trial or before the verdict of the jury shall have been returned into court, voluntarily absent himself from the presence of the court without leave of court, or is removed from the presence of the court because of his disruptive conduct during the trial, the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of said case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times.

(c) Defendant May Be Tried in Absentia for Misdemeanors. Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid.

(d) Presence of Corporation. A corporation may appear by counsel at all times and for all purposes.

Committee Note

Same as prior Rule except (3) added to conform to Rule 3.220(k); other sections renumbered.

V. PRE-TRIAL MOTIONS AND DEFENSES

Rule 3.190. Pre-Trial Motions

(a) Pre-Trial Motions in General. Every pre-trial motion and pleading in response to a motion shall be in writing and signed by the party making the motion or the attorney for the party. This requirement may be waived by the court for good cause shown. Each such motion or other pleading shall state the ground or grounds on which it is based. A copy shall be served on the adverse party's attorney before the time the original is filed. A certificate of service must accompany the filing of any such pleading.

(b) Motion to Dismiss.

Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.

(c) Time for Moving to Dismiss. Unless the court grants him further time, the defendant shall move to dismiss the indictment or information either before or upon arraignment. The court in its discretion may permit the defendant to plead and there-

after to file a motion to dismiss at a time to be set by the court. Except for objections based upon fundamental grounds, every ground for motion to dismiss which is not presented by a motion to dismiss within the time hereinabove provided for shall be taken to have been waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:

(1) The defendant is charged with an offense for which he has been pardoned; or

(2) The defendant is charged with an offense of which he has previously been placed in jeopardy; or

(3) The defendant is charged with an offense for which he has previously been granted immunity; or

(4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

(d) Traverse or Demurrer. The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under (c)(4) of this rule shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss. Such demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

(e) Effect of Sustaining a Motion to Dismiss. If the motion to dismiss is sustained the court may order that the defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment or information. If a new indictment or information is not filed within the time specified in the order, or within such additional time as the court may allow for good cause shown, the defendant, if in custody, shall be discharged therefrom, unless some other charge justifies a continuation in custody. If he has been released on bail he and his sureties shall be exonerated; if money or bonds have been deposited as bail such money or bonds shall be refunded.

(f) Order Dismissing. For the purpose of construing Section 924.07(1), Florida Statutes (1969), the statutory term "order quashing" shall be taken and held to mean "order dismissing."

(g) Motion for Continuance.

(1) *Definition.* A continuance within the meaning of this rule is the postponement of a cause for any period of time.

(2) *Cause.* The court on motion of the State or a defendant or upon its own motion may in its discretion for good cause shown grant a continuance.

(3) *Time for Filing.* A motion for continuance may be made only before or at the time the case is set for trial, unless good cause for failure to so apply is shown or unless the ground for the motion arose after the cause was set for trial.

(4) *Certificate of Good Faith.* A motion for continuance shall be accompanied by a certificate of the movant's counsel that the motion is made in good faith.

(5) *Affidavits.* The party applying for a continuance may file affidavits in support of his motion, and the adverse party may file counter-affidavits in opposition to the motion.

(h) Motion to Suppress Evidence in Unlawful Search.

(1) *Grounds.* A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:

(1) The property was illegally seized without a warrant, or

(2) The warrant is insufficient on its face, or

(3) The property seized is not that described in the warrant, or

(4) There was no probable cause for believing the existence of the grounds on which the warrant was issued, or

(5) The warrant was illegally executed.

(2) *Contents of Motion.* Every motion to suppress evidence shall clearly state the particular evidence sought to be suppressed, the reasons for suppression and a general statement of the facts on which the motion is based.

(3) *Hearing.* Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied. If the court hears the motion on its merits, the defendant shall present evidence supporting his position and the State may offer rebuttal evidence.

(4) *Time for Filing.* The motion to suppress shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial.

(i) Motion to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

(j) Motion to Take Deposition to Perpetuate Testimony.

(1) After an indictment or information upon which a defendant is to be tried is filed, the defendant or the State may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

(2) If the defendant or the State desires to perpetuate the testimony of a witness living in or out of the State whose testimony is material and necessary to the case, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by him and filed in the trial court.

(3) If the deposition is taken on the application of the State, the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep him in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but his failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present. The State shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The State shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed that is in the possession of the State and that the State would be required to make available to the defendant if the witness were testifying at trial.

(4) The application and order to issue the commission may be made either in term time or in vacation. The commission shall be issued at a time to be fixed by the court.

(5) Except as otherwise provided, the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution and return of the commission and the opening of the depositions in civil actions shall apply in criminal cases.

(6) No deposition shall be used or read in the evidence when the attendance of the witnesses can be procured. If it shall appear to the court that any person whose deposition has been taken has absented himself by procurement, inducement or threats of any person on behalf of the State or of the defendant or of any person on his behalf, the depositions shall not be read in evidence on behalf of the defendant.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

Repeal

Laws 1979, c. 79-69, § 3, provides for the repeal of Rule 3.190(j) "insofar as it is inconsistent with the provisions of this act." Section 4 of the law provides: "This act shall take effect upon becoming a law, except that section 3 shall take effect only if passed by a two-thirds vote of the membership of each house of the legislature." The law was passed with the requisite majority vote. The other provisions of the law will be designated as F.S.1979 § 918.17 which permits video-taping of testimony of certain minors in cases involving sexual battery or child abuse.

Committee Note

1972 Revision. Subdivision (h) is amended to require the defendant to specify the factual basis behind the grounds for a motion to suppress evidence. Subdivision (i) is amended to permit the State to take depositions under the same conditions that the defendant can take them. Former sections (j) and (k) transferred to Rules 3.150, 3.151 and 3.152. Sections (l) and (m) renumbered (j) and (k) respectively. Otherwise, same as prior rule.

1977 Amendment. This amendment removes any ambiguity in the rule as to whether the State must file a general or a specific traverse to defeat a motion to dismiss filed under the authority of Rule 3.190(c)(4).

See State v. Kemp, 305 So.2d 833 (Fla.3d DCA 1974).

The amendment clearly now requires a specific traverse to specific material fact or facts.

Rule 3.191. Speedy Trial

(a)(1). Speedy Trial Without Demand. Except as otherwise provided by this Rule, and subject to the limitations imposed under (b)(1) and (b)(2), every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, and if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion, shall make the required inquiry under (d)(3). The time periods established by this section shall commence when such person is taken into custody as defined under (a)(4). A person charged with a crime is entitled to the benefits of this Rule whether such person is in custody in a jail or correctional institution of this

APR 28 1982
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6606

MARVIN FRANCOIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that the petitioner be allowed to proceed in forma pauperis for the reasons stated in the attached affidavit. The petitioner has been previously adjudicated indigent for costs and fees in the court of the State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 27th day of April, 1982.

Respectfully submitted

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
Of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: Rory S. Stein
RORY S. STEIN
Assistant Public Defender

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-vs-

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Marvin Francois, being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the cost of prosecuting the cause are true.

I am not presently employed and have not been employed for four years preceding the execution of this affidavit.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources. I do not own any cash or checking or savings account.

I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Marvin Francois
MARVIN FRANCOIS

Duly witnessed and sworn to before me, a Notary Public, this 8 day of April, 1982.

Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 11, 1983

ORIGINAL

NO. 81-6606

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OCTOBER TERM, 1981

MARVIN FRANCOIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S JURISDICTION?

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PREFACE

The Petitioner was the Appellant in the Supreme Court of Florida, and Defendant in the Florida trial court. The Respondent, the State of Florida, was the Appellee in the Supreme Court of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief

(A) For the portions of the record offered to show jurisdiction in this court, which are contained in the Petitioner's Appendix.

1.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at Francois v. State, 407 So.2d 885 (Fla. 1982). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant claims jurisdiction based upon 28 U.S.C. §1257(3).

III

CONSTITUTION AND STATUTORY PROVISIONS

The Defendant's brief on his "Petition for Certiorari" claims error based upon the Eighth and Fourteenth Amendments of the United States Constitution. The Defendant however, has failed to recite said provisions. The Eighth Amendment provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides inter alia that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

SUMMARY OF ARGUMENT

The Defendant's claims present no substantial federal question, and the Defendant has presented no special or important reasons for granting the writ.

V

ARGUMENT

The Defendant presents two bases for the exercise of this Court's jurisdiction: 1.) that the Supreme Court of Florida has erred within the meaning of Castaneda v. Partida, 430 U.S. 482 (1977) in refusing to permit litigation on the issue of the composition of grand juries in Dade County, Florida and 2.) that under Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, __U.S. __, 102 S.Ct. 90 (1981), remand on certified question __U.S. __, 31 Cr.L.R. 3035 (1982), the Supreme Court of Florida has erred in not vacating the present death penalties, where the Florida Supreme Court struck three (3) of seven (7) aggravating circumstances. The Defendant's complaints present no substantial federal question and do not specially warrant the exercise of this Court's jurisdiction.

A. First of all, as to the Grand Jury issue, the Florida Supreme Court ruled that the Defendant had waived any right to seek redress and review of his grand jury motion by failing to timely seek a hearing on the motion. A4-A5 (407 So.2d at 888-889). The State submits that an interpretation of state court procedure and state law is binding on federal courts, Wainwright v. Stone, 414 U.S. 21 (1973) and as a question of state law and a breach of state procedure, an issue serves as no basis for jurisdiction or review in this Court. See, Fuller v. Oregon, 417 U.S. 40 (1974); Street v. New York, 394 U.S. 576 (1969); Rice v. Sioux City Cemetary, 349 U.S. 70 (1955); Lynch v. New York, 293 U.S. 52 (1934); see, also, United States v. Frady, __U.S. __, 102 S.Ct. 1584 (1982); Engle v. Isaac, __U.S. __, 102 S.Ct. 1558 (1982). Indeed, the position of the Florida Supreme Court herein is

entirely consistent with federal law. See, Francis v. Henderson, 425 U.S. 536 (1976) (failure to raise issue of composition of grand jury before trial and absent showing of actual prejudice, right to challenge grand jury is waived); Michel v. Louisiana, 350 U.S. 91 (1955); cf. Castaneda v. Partida, 430 U.S. 482, at 485, n.4, (1977) (where state courts consider a grand jury claim on the merits over procedural objections the federal courts will also).

The controlling principles therefore are noted in Michel v. Louisiana, where the Court said:

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury." [Footnote omitted].
>
> * * *
>
> "We hold only that due regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquisitional process[5]. . ."

---

5. "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may effect other convictions based on indictments returned by the grand jury."

350 U.S. at 97-98 n.5.

Accord, Francis v. Henderson, 425 U.S. at 540-541, citing Michel v. Louisiana, supra; see, also, Wainwright v. Sykes, 433 U.S. 72 (1979); Yakus v. United States, 321 U.S. 414, 444 (1943) (no principle is more familiar to court than that a constitutional right may be waived by the failure to make a timely assertion of that right). The policy under Francis v. Henderson, and Michel v. Louisiana, is no more applicable than in the case at bar. The Defendant does not challenge the petit jury herein, which found him guilty of six first degree murders, beyond and to the exclusion of every reasonable doubt. The Respondent submits that there is simply no showing of prejudice to this Defendant upon this record. See, Francis v. Henderson, supra. Furthermore, the broad public policy for challenging a grand jury system is no longer served in the case at bar, since the grand jury system in Dade County, Florida is no longer on a "key man" system of selection by computer. See, Barnason v. State, 371 So.2d 680, at 681, n.1 (Fla. 3d DCA 1979), Ch. 78-455, Laws of Fla. (repealing grand jury statute).

B. With regard to the reduction of the present aggravating circumstances from seven to four, the Florida Supreme Court has repeatedly ruled that a reduction of aggravating circumstances does not invalidate a sentence of death even if there are mitigating circumstances. See, e.g., Armstrong v. State, 399 So.2d 953, at 963 (Fla. 1981); Brown v. State, 381 So.2d 690 at 696 (Fla. 1980); Hargrave v. State, 366 So.2d 1 at 4-6 (Fla. 1979). In the present case, there remain four (4) aggravating and no mitigating circumstances. Under Florida Law the present sentence is proper as a matter of law. See, e.g., Profitt v. Florida, 428 U.S. 242 (1976) (no mitigating); Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1, at 5 (Fla. 1979); Gibson v. State, 351 So.2d 948, at 951 (Fla. 1977) (where no mitigating

three (3) aggravating, "doubling" is irrevelant); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978) (no mitigating); Jackson v. State, 359 So.2d 1190 at 1194-1195 (Fla. 1978) (no mitigating); Darden v. State, 329 So.2d 287 at 291 (Fla. 1976) (no mitigating); Douglas v. State, 328 So.2d 18 at 21-22 (Fla. 1976) (no mitigating); Sullivan v. State, 303 So.2d 632 at 637-638 (Fla. 1974) Overton, J., concurring, (no mitigating). The underlying premise here is expressed by the Court in State v. Dixon, 283 So.2d 1, at 9 (Fla. 1973):

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. §921.141(7), F.S.A." [Emphasis added].

Certainly however, the Florida death penalty process under Section 921.141 Florida Statutes is not a mechanical check list, but rather is based upon a "reasoned judgment" upon the facts of each case. See, Profitt v. Florida, 428 U.S. at 250-250, 256-257, n.8 and n.14; Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977); Dixon, 283 So.2d at 10. The concern of this Court in Zant upon remand for the certified question, plainly lies with the ability of this Court or any court to ascertain the "reasoned judgment" requirement because of the uncertainty in examining a jury's sentencing determination in Georgia. See, ___U.S. at ___, 31 Cr.L.R. at 3036. However, in Florida unlike the Georgia statute in Zant, the trial judge is the sole sentencing authority and the jury's verdict is only advisory. White v. State, 403 So.2d 331 at 339-340 (Fla. 1981), cert. application pending, U.S.Sup.Ct. Case No. 81-5971. The distinction between the

trial judge as the sentencing authority and the jury as a sentencing authority may be an important distinction of the present case from that in Zant.

In Florida, as in the present case, the trial court is required to prepare an extensive order as to what grounds the Court found as aggravating and mitigating. The Florida Supreme Court, as for example in Brown v. State, supra, has specifically drawn upon this factor to sustain the death penalty even after eliminating certain aggravating circumstances, explaining that:

> "Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 years at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances." [Emphasis added].
>
> 381 So.2d at 696.

Thus unlike Zant where a jury deliberation may be substantially unknown, in Florida the trial judge's analysis is "known" and open for inspection to determine whether or not the sentence is lawful, even with the reduction of aggravating factors. Therefore, as the Florida Supreme Court concluded in Brown, the ability to make certain a reasoned judgment is left completely intact:

> "This case then is dissimilar to Elledge, but like Hargrave v. State, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973)." [Emphasis added].
>
> Id.

Certainly the present cause does not conflict with Zant but rather serves to properly define it.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 2nd day of June, 1982, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128

(305) 377-5441